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1292 No. 3685 1293

United States
1 1293
Circuit Court of Appeals

For the Ninth Circuit.

OLAF HAUGE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3685

United States

Circuit Court of Appeals

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

Mr. ERWIN J. ROWE, Panama Building, Portland, Oregon,
For the Plaintiff in Error.

Mr. LESTER W. HUMPHREYS, United States Attorney, District of Oregon, Portland, Oregon,
For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To LESTER W. HUMPHREYS, United States Attorney for Oregon, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein No. C–9101, Olaf Hauge, plaintiff in error, United States of America, defendant in error, *plaintiff in error and you are defendant in error,* to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said Dis-

trict, this day of April 21, in the year of our Lord, one thousand nine hundred and 21.

CHAS. E. WOLVERTON,
Judge. [1*]

State of Oregon,
County of Multnomah.—ss.

Due service of the within citation is hereby accepted in Multnomah County, Oregon, this 21st day of April, 1921, by receiving a duly certified copy thereof certified to by Erwin J. Rowe, attorney for plaintiff in error.

LESTER W. HUMPHREYS,
United States Attorney.

[Endorsed]: No. C-9101. United States District Court, District of Oregon. United States of America vs. Olaf Hauge. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Apr. 21, 1921. G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

OLAF HAUGE,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between The United States of America, plaintiff and defendant in error, and Olaf Hauge, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court

of the United States this 5th day of April, 1921.

[Seal] G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Deputy. [2]

Service of the foregoing writ of error made this 5th day of April, 1921, upon the District Court of the United States for the District of Oregon, by filing with me, as clerk of said court, a duly certified copy of said writ of error.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: No. C–9101. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Olaf Hauge, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed April 5th, 1921. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. L. Buck, Deputy Clerk.

In the District Court of the United States for the District of Oregon.

July Term, 1920.

BE IT REMEMBERED, That on the 28th day of October, 1920, there was duly filed in the District Court of the United States for the District of Ore-

gon, an indictment, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

OLAF HAUGE,

Defendant.

Indictment for Violation of Section 80 of the Federal Penal Code.

United States of America,
District of Oregon,—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn, and charged to inquire within and for said district, upon their oaths and affirmations, do find, charge, allege, and present:

That Olaf Hauge, the defendant above named, at Portland, in the State and District of Oregon and within the jurisdiction of this court, on or about the 17th day of June, 1920, in the District Court of the United States for the District of Oregon, was then and there under examination in said District Court of the United States for the District of Oregon, in naturalization proceedings touching the qualifications of said Olaf Hauge to be admitted as a citizen of the United States, which said examination was then and there a proceeding under and by virtue of the act of Congress relating to the naturalization of aliens and the said Olaf Hauge then and there took an oath to answer truthfully all questions

which might be put to him touching his qualifications for admission to become a citizen of the United States, and the said Olaf Hauge then and there in the aforesaid naturalization proceedings, in the said District Court of the United States for the District of Oregon, and while so under oath to tell the [4] truth as aforesaid, did unlawfully, wilfully, knowingly, and feloniously falsely swear and assert that he, the said Olaf Hauge, on or about the 9th day of January, 1918, and at the time he filed his questionnaire with Local Board for Division No. 65, city of Chicago, State of Illinois, in the course of registration for military service, did not make or assert in said questionnaire any claim for exemption from the military service of the United States by virtue of his alienage, foreign citizenship, or the fact that he was not a citizen of the United States.

WHEREAS IN TRUTH AND IN FACT he, the said Olaf Hauge, did on or about the 8th day of January, 1918, file with Local Board for Division No. 65, City of Chicago, State of Illinois, a questionnaire, and in said questionnaire, so filed by the defendant, the said defendant claimed exemption as a resident alien, not an enemy, and claimed classification in Division "F" of Class V, and said defendant claimed exemption from military service because he was not a citizen of the United States and stated that he was willing to return to his native country and enter its military service and the said defendant, on the said 17th day of June, 1920, well knew that he had made said claims for exemption; contrary to the form of the statute in such case made and provided and

against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 28th day of October, 1920.

A true bill.

B. BULLWINKLE,
Foreman, United States Grand Jury
LESTER W. HUMPHREYS,
United States Attorney

[Endorsed]: A True Bill. B. Bullwinkle, Foreman Grand Jury. Filed, in open court, October 28, 1920. G. H. Marsh, Clerk. [5]

AND AFTERWARDS, to wit, on Tuesday, the 16th day of November, 1920, the same being the 13th judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [6]

In the District Court of the United States for the District of Oregon.

No. C–9101—November 16, 1920

Indictment: Section 80 P. C.

THE UNITED STATES OF AMERICA
vs.
OLAF HAUGE.

Plea and Arraignment.

Now at this day come the plaintiff by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Arthur Dayton, of counsel. Whereupon, said defendant being duly arraigned upon the indictment herein, for plea thereto says he is not guilty. And thereupon, upon motion of plaintiff, it is ORDERED that this cause be and the same is hereby set for trial for Tuesday, February 8, 1921, at 10 o'clock A. M. [7]

AND AFTERWARDS, to wit, on Tuesday, the 29th day of March, 1921, the same being the 20th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [8]

In the District Court of the United States for the District of Oregon.

No. C–9101—March 29, 1921.

Indictment: Section 80 P. C.

THE UNITED STATES OF AMERICA

vs.

OLAF HAUGE.

Order Fixing Time for Sentence.

Now at this day come the plaintiff by Mr. Lester

W. Humphreys, United States Attorney, and the defendant above named in his own proper person and by Mr. Erwin J. Rowe, of counsel, whereupon the jury impaneled herein come into court, answer to their names, and return to the Court their duly sealed verdict herein, in words and figures as follows, to wit:

"We, the jury, duly impaneled to try the above-entitled cause, do find the defendant, Olaf Hauge, guilty as charged in the indictment herein.

"Dated at Portland, Oregon, this 29th day of March, 1921.

"A. T. BLAIR,
"Foreman."

—which verdict is received by the Court and ordered to be filed. Whereupon, it is ORDERED that said defendant appear before this Court for sentence on Tuesday, April 6, 1921. [9]

AND AFTERWARDS, to wit, on the 29th day of March, 1921, there was duly filed in said court a verdict, in words and figures as follows, to wit: [10]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA

vs.

OLAF HAUGE,

Defendant.

Verdict.

We, the jury, duly impaneled to try the above-entitled cause, do find the defendant, Olaf Hauge, guilty as charged in the indictment herein.

Dated at Portland, Oregon, this 29th day of March, 1921.

A. T. BLAIR,
Foreman.

Filed March 29, 1921. G. H. Marsh, Clerk [11]

AND AFTERWARDS, to wit, on Tuesday, the 5th day of April, 1921, the same being the 26th judicial day of the regular March term of said court —Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [12]

In the District Court of the United States for the District of Oregon.

No. C-9101—April 5, 1921.

Indictment: Section 80 P. C.

THE UNITED STATES OF AMERICA
vs.
OLAF HAUGE.

Sentence.

Now, at this day, come the plaintiff by Mr. Lester W. Humphreys, United States Attorney, and the de-

fendant above named in his own proper person and by Mr. Erwin J. Rowe, of counsel, whereupon this being the time set by the Court for passing sentence upon said defendant upon the verdict heretofore returned herein,—

IT IS ADJUDGED that said defendant do pay a fine of $100.00, and that he be imprisoned in the county jail of Multnomah county, Oregon, for the term of six months, and that he stand committed until said sentence be performed or until he be discharged according to law. [13]

AND AFTERWARDS, to wit, on the 5th day of April, 1921, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [14]

In the District Court of the United States for the District of Oregon.

No. C–9101.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF HAUGE,

Defendant.

Petition for Writ of Error Returnable to United States Circuit Court of Appeals, Ninth Circuit.

Now comes Olaf Hauge, defendant herein, by his attorney Erwin J. Rowe, and says that on or about the 28th day of March, 1921, this Court entered judg-

ment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto and thereunder in this case certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail, from defendant's assignment of error which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

ERWIN J. ROWE,
Attorney for the Defendant,
Plaintiff in Error.
Address and Postoffice Address:
322–323 Washington Building.

Filed April 5, 1921. G. H. Marsh, Clerk. [15]

AND AFTERWARDS, to wit, on the 5th day of April, 1921, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [16]

In the District Court of the United States for the District of Oregon.

#C–9101.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF HAUGE,

Defendant.

Assignment of Errors.

Comes now the above-named defendant by his attorney, Erwin J. Rowe, and in connection with his petition for a writ of error, makes the following assignments of error which he avers occurred upon the trial of the cause:

I.

The Court erred in the admission of testimony on the part of the plaintiff therein of a preliminary petition for admission for citizenship by the defendant, which was alleged and asserted to have been signed by the defendant, and which set out that the defendant claimed therein that he had not claimed exemption from the military service at the time of making out his questionnaire; that the said petition was incompetent, irrelevant, and immaterial in so far that the plaintiff had failed to lay a foundation showing same to have been signed by plaintiff, and that further because it was not set out in the indictment, and formed no part of the charge of which the defendant was accused. Objection and exception taken and allowed.

II.

That the Court erred in the admission of the testimony of V. W. Tomlinson, United States Naturalization Commissioner for Oregon, a witness for the plaintiff, who testified that at a rehearing of the defendant's application for citizenship, that the defendant admitted that at the [17] original hearing he had testified that he the defendant had not claimed exemption from the military service in his questionnaire, that said testimony was incompetent, irrelevant, and immaterial, in so far as it had no bearing on the charge of which the defendant had been accused. Objection and exception taken and allowed.

III.

That the Court erred in refusing defendant's motion for a directed verdict; which said motion was based on the grounds that the plaintiff had failed to show that the question as to whether or not the defendant had claimed exemption from the military service on the grounds of being an alien was competent, relevant, or material.

IV.

That the Court erred in the rejection of the testimony of Mrs. Inga Hauge, wife of the defendant, who was present at the said trial and was duly called as a witness for the defendant; objection taken by plaintiff sustained, exception taken and allowed defendant, that the said Mrs. Hauge had she been allowed to testify would have testified: "That at the time a questionnaire was made out, that she was defendant's wife. That all the questions in the said

questionnaire were answered by her with the exception of when the defendant came to this country, on what boat, and to what port, and further that the defendant did not know what answers she made to the said questions therein contained, or what claims she had made for his exemption from the military service therein. And that she had not informed him as to what claims had been made therein." [18]

V.

That the defendant had present at the said trial the following persons: Mr. Rates, Mr. Guy, Mr. Shields, Mr. M. C. Hill, and Mr. O. Benson, that the said witnesses were duly called by the defendant, but the Court refused to allow them to testify, that had the said witnesses been allowed to testify, they would have testified that they lived in the same locality with the defendant, that they had known him for periods of from one to two years each, and that they know his general reputation in the locality in which he resided for truth and veracity, that his general reputation for truth and veracity in that locality was good. Objection and exception taken and allowed.

ERWIN J. ROWE,
Attorney for Defendant, Plaintiff in Error.

State of Oregon,
County of Multnomah,—ss.

Due service of the enclosed assignment of errors is hereby acknowledged in Multnomah County, Oregon, this 5th day of April, 1921, by receiving a

certified copy thereof, duly certified to by Erwin J. Rowe, attorney for defendant.

LESTER W. HUMPHREYS,
United States Attorney.

Filed April 5, 1921. G. H. Marsh, Clerk. [19]

AND AFTERWARDS, to wit, on Tuesday, the 5th day of April, 1921, the same being the 26th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [20]

In the District Court of the United States for the District of Oregon.

No. C–9101.

April 5, 1921.

UNITED STATES OF AMERICA,
Defendant in Error, Plaintiff,

vs.

OLAF HAUGE,
Plaintiff in Error, Defendant.

Order Admitting Plaintiff in Error to Bail.

It appearing that a writ of error has been sued out in this case by the defendant, returnable to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of this court made and entered on or about the 5th day of April, 1921, and it appearing that the United States Attorney

has no objections, it is ORDERED that the defendant be admitted to bail pending said writ of error in the sum of Two Thousand ($2,000.00) Dollars, conditioned as the law directs.

CHAS. E. WOLVERTON,
Judge.

I have no objections to the above order.

LESTER W. HUMPHREYS,
United States Attorney.

Filed April 5, 1921. G. H. Marsh, Clerk. [21]

AND AFTERWARDS, to wit, on Tuesday, the 5th day of April, 1921, the same being the 26th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [22]

In the District Court of the United States for the District of Oregon.

C–9101.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OLAF HAUGE,
Defendant.

Order Allowing Writ of Error.

This 5th day of April, 1921, Olaf Hauge, defendant in the above-entitled action, by his attorney,

Erwin J. Rowe, and filed herein and presented to the Court his petition, praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of Two Thousand Dollars ($2,000.00), which shall operate as a supersedeas bond.

CHAS. E. WOLVERTON.

Done in open court this 5th day of April, 1921.

ERWIN J. ROWE,

Attorney for Defendant, Plaintiff in Error, 322–323 Washington Building.

State of Oregon,
County of Multnomah,—ss.

Due service of the enclosed petition and also copy of order allowing writ and copy of order allowing [23] defendant to bail is hereby received by receiving a certified copy thereof duly certified to by Erwin J. Rowe, attorney for defendant.

Dated at Portland this 5th day of April, 1921.

LESTER W. HUMPHREYS,
United States Attorney.

Filed April 5, 1921. G. H. Marsh, Clerk. [24]

AND AFTERWARDS, to wit, on the 5th day of April, 1921, there was duly filed in said court a supersedeas bond on writ of error, in words and figures as follows, to wit: [25]

In the District Court of the United States for the District of Oregon.

C–9101.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OLAF HAUGE,
Defendant.

Bail Bond Pending Writ of Error.

United States of America,
District of Oregon,
State of Oregon,
County of Multnomah,—ss.

We, Olaf Hauge, plaintiff in error, and Henry Tschopp and Henry Swales, as sureties, jointly and severally, acknowledge ourselves indebted to the United States of America in the sum of two thousand dollars ($2,000.00), lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands, tenements, and, etc., upon this condition.

WHEREAS, the said Olaf Hauge has sued out a writ of error from the judgment of the District Court of the United States of America, for the District of Oregon, in the case #9101, wherein the United States of America is plaintiff and Olaf

Hauge defendant, judgment having been entered against the defendant therein; for a review by the Circuit Court of Appeals for the Ninth Circuit.

Now, if the said Olaf Hauge shall appear and surrender himself in the District Court of the United States of America, for the District of Oregon, on and after the filing of the mandate of the United States Circuit Court of Appeals, and from time to time thereafter as he may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in [26] this case, and shall abide by and perform any judgment or order which may be rendered in the said Circuit Court of Appeals for the Ninth Circuit, and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise to remain in full*y* force and effect.

Witness our hands and seals this —— day of April, 1921.

OLAF HAUGE,
Plaintiff in Error.
HENRY TSCHOPP,
Surety.
HENRY SWALES,
Surety.

State of Oregon,
County of Multnomah,—ss.

I, Henry Tschopp, whose name is subscribed to the within undertaking as surety, being first duly sworn, on my oath depose and say: That I am a resident and real property holder within the State of

Oregon, that I am not a counselor or attorney at law, sheriff, or other officer of the court, and that I am worth property in the sum of Two Thousand Dollars ($2,000.00), over and above all debts and liabilities and exclusive of property exempt from execution.

HENRY TSCHOPP.

Subscribed and sworn to before me this 4th day of April, 1921.

[Seal] ERWIN J. ROWE,
Notary Public for Oregon.

My commission expires June 1, 1922. [27]

State of Oregon,
County of Multnomah,—ss.

I, Henry Swales, whose name is subscribed to the within undertaking as surety, being first duly sworn, on my oath depose and say: That I am a real property holder of the State of Oregon, that I am worth the sum of Two Thousand Dollars ($2,000.00), over and above all debts and liabilities, and exclusive of property exempt from execution.

HENRY SWALES.

Subscribed and sworn to before me this 4th day of April, 1921.

[Seal] ERWIN J. ROWE,
Notary Public for Oregon.

My commission expires June 1, 1921.

Bond approved this 5th day of April, 1921.

CHAS. E. WOLVERTON,
Judge.

LESTER W. HUMPHREYS,
United States Attorney.

State of Oregon,
County of Multnomah,—ss.

Due service of a copy of the within bail bond is hereby *accept* in Multnomah County, Oregon, this 5th day of April, by receiving a certified copy thereof, certified to by Erwin J. Rowe, attorney for defendant.

LESTER W. HUMPHREYS,
United States Attorney.

Filed April 5, 1921. G. H. Marsh, Clerk. [28]

AND AFTERWARDS, to wit, on the 25th day of April, 1921, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

No. C–9101.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OLAF HAUGE,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, to wit, on the 28th day of March, in the year of our Lord one thousand nine hundred and twenty-one, at a stated term of the District Court of the United

States of America, for the District or Oregon, begun and holden at the City of Portland, Multnomah County, State of Oregon, before his Honor Charles E. Wolverton, District Judge of the United States, the issue being joined in the above-entitled cause between the parties came on for trial before the said Judge sitting with a jury; the United States of America, plaintiff, being represented by the Honorable Lester W. Humphreys, United States Attorney for Oregon, and the defendant Olaf Hauge being represented by attorney Erwin J. Rowe. Plaintiff offered in evidence the following testimony and records to maintain and prove his case, viz.:

Testimony of Mr. Norton, Clerk of the United States District Court for the District of Oregon, who testified that a term of the said court, to wit, on the seventeenth day of June, 1920, at a hearing in open court of defendant Olaf Hauge's petition for admission as a citizen of the United States of America by naturalization, the said defendant Olaf Hauge was called as a witness and was thereupon duly sworn, and that thereafter the said Olaf Hauge was questioned as to whether or not he had claimed exemption from the military service of the United States [30] at the time of making out his questionnaire on or about the 9th day of January, 1918; to which question the defendant testified that he had not claimed exemption on the said grounds in his questionnaire.

Plaintiff thereafter called as a witness V. W. Tomlinson, who testified that he is a naturalization

examiner, duly appointed, qualified, and acting for the United States of America; that five days before the hearing for admission of the defendant as a citizen, he received from the Adjutant-General of the Army information that the defendant had in his questionnaire claimed exemption from the military service on the grounds of being an alien; that he thereupon filed in the District Court of the United States for the District of Oregon a petition for a rehearing of the defendant's petition for naturalization, and that, in August, 1920, such rehearing was had in open court in the District Court of the United States for the District of Oregon, and that at such rehearing the defendant took the witness-stand in his own behalf and was thereupon sworn to tell the truth, and that the defendant at such rehearing, after having been sworn as a witness, testified that he had at the prior hearing on June 17, 1920, testified that he had not claimed exemption from the military service of the United States at the time of making out his questionnaire on the grounds of being an alien.

"Whereupon counsel for the defendant objected to the testimony as to the statements made by the defendant under oath at the rehearing, on the grounds that same was incompetent, irrelevant, and immaterial, which objection was there and then overruled, and the said witness was allowed to testify as above stated, to which ruling of the court the defendant then and there excepted, which exception was then and there allowed." [31]

II.

The said witness, V. W. Tomlinson, Naturalization Examiner of the United States, being on the witness-stand, testified that he is the Naturalization Examiner in Charge at Portland, Oregon; that the defendant filed a petition for naturalization in the District Court of the United States for the District of Oregon; that thereafter and prior to the said 17th day of June, 1920, said witness, as Naturalization Examiner, sent to the defendant by mail a typewritten or printed blank form of questions to be answered by the defendant as an applicant for naturalization. That the said witness has the custody of the records of the Bureau of Naturalization, at Portland, Oregon. That prior to the said 17th day of June, 1920, the defendant wrote answers in the aforesaid blank form, sent him by the Naturalization Examiner and returned the same by mail to the said Naturalization Examiner; since which time the said Naturalization Examiner has had the said blank form, with the answers of the defendant written thereon, in his possession, and then had it in his possession.

"Whereupon, the witness was asked to produce said blank form with the written answers of the defendant, and the plaintiff then and there offered said blank form with the written answers of the defendant in evidence."

Whereupon, defendant objected on the grounds that the said blank form with the written answers, was incompetent, irrelevant, and immaterial.

The Court then and there overruled said objec-

tion and said blank form with the written answers was received in evidence and was marked Plaintiff's Exhibit #1, to which ruling of the Court the defendant then and there excepted, which exception was then and there allowed. [32]

III.

"Plaintiff then offered in evidence a certified photostat copy of the defendant's questionnaire, which was marked Plaintiff's Exhibit No. 2, which disclosed that the defendant had made in said questionnaire claims for exemption from the military service of the United States on the grounds of being a resident alien, not an enemy, who claims exemption, and on the grounds that he was a person totally and permanently physically or mentally unfit for military service; and on the grounds that he was a man whose wife and children are mainly dependent on his labor for support"; and further.

"That the following questions and answers were contained in said questionnaire in series VII thereof as follows:

Q. Are you a citizen of the United States?

A. No.

Q. Do you claim exemption from military service because you are not a citizen? A. Yes.

Q. Are you willing to return to your native country and enter its military service? A. Yes.

Thereupon plaintiff rested its case."

Whereupon counsel for the defendant moved the Court for a directed verdict, on the grounds that the plaintiff had failed to show that the question asked defendant at the hearing, to wit, whether or not the

defendant Olaf Hauge had claimed exemption from the military service on the grounds of being an alien, was a competent, revelant, or material question.

Thereupon the Court did then and there refuse [33] defendant's said motion, to which ruling the defendant did then and there propose exception to the said ruling of the Court, which exception was then and there allowed.

IV.

"The defendant then and there took the witness-stand in his own behalf, and testified that his wife had filled out his questionnaire, except as to when defendant came to this country, on what ship, and to what port of entry, that he did not discuss with his said wife claims for exemption made in said questionnaire.Defendant further testified that he personally took the questionnaire before the notary public, who administered to him the oath in the registrant's affidavit."

"Whereupon defendant to maintain and prove his case called as a witness Mrs. Inga Hauge, wife of the defendant, who was then and there present, ready, willing, and able to testify, and who would have testified had she been allowed to as follows, to wit:

"That she was at the time a questionnaire was made out for the defendant, to wit, on the 9th day of January, 1918, she was the wife of the said defendant Olaf Hauge."

"That all the questions in said questionnaire were answered by her, with the exception of as to when the defendant came to this country, on what ship, and to what port of entry. And further that the

defendant did not know what answers she made to the questions in the said questionnaire, or what claims were made for his exemption from the military service, and that she had not informed him as to what claims were made therein. [34]

"Whereupon counsel for plaintiff did then and there object to allowing the said Inga Hauge to testify, on the grounds that she was the wife of the defendant and was therefore incompetent as a witness; and the said Judge did then and there refuse to allow said witness to testify.

"Whereupon counsel for the defendant did then and there propose his objection and exception to the said ruling of the Court which exception was then and there allowed.

V.

"Thereafter the defendant called as witnesses the following, to wit:

"Emil Straub, who testified that he knew the defendant, and that he knew his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

"Henry Swales, who testified that he knew the defendant, that he knows his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

"A. B. Benson, who testified that he knows the defendant and has known him for a year and a half, that he knows his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

"George Cole, who testified that he has known the

defendant for over a year; that he knows his reputation for truth and veracity in the community in which he resides and that such reputation is good.

"J. S. Theberge, who testified that he had known the defendant for over a year and a half, that he knows [35] defendant's reputation for truth and veracity in the community in which he resides, and that such reputation is good.

"Thereupon attorney for the defendant in order to maintain and prove the issues of his case attempted to call as witnesses the following named witnesses, M. C. Hill, Mr. Rates, Mr. Guy, and Mr. Shields; who were present in the courtroom and who had they been allowed to testi*fed* that they had lived in the same locality as the defendant; that they had known the defendant for periods of from one to two years each, and that they knew the defendant's general reputation for truth and veracity in the community in which he resides, and that such reputation of the defendant is good.

"Thereupon the Judge presiding at such hearing asked the defendant's counsel if the testimony of the said witnesses would be to the same effect as that of the six witnesses to defendant's reputation, as to his truth and veracity, who had just been called, to which defendant's counsel responded that they would.

"Whereupon, the said Judge did then and there refuse to allow the said persons to testify, on the grounds that the defendant had already called six prior witnesses on the same point and that further accumulative testimony as to the defendant's reputation for truth and veracity would not be permitted,

to which ruling of the Court the defendant then and there objected, on the grounds that the said Court did not have the right to limit the number of witnesses as to the defendant's general reputation for truth and veracity, and the defendant then and there save an exception, which exception was then and there allowed." [36]

Certificate of Judge to Bill of Exceptions.

And now, therefore, because the foregoing matters and things are not of record in this case, I, Charles E. Wolverton, United States District Judge for the District of Oregon, the Judge who tried the above-entitled cause in the above-entitled court, do certify that the foregoing bill of exceptions correctly states the proceedings had before me on the trial of the said cause so far as they are herein set out, and truly states the rulings of the Court upon the questions of law presented, and the exceptions taken by the defendant appearing therein were duly taken and allowed; that the said bill of exceptions were prepared and submitted within the time allowed, and is now signed, sealed, and settled as and for the bill of exceptions in said cause, and the same is hereby ordered to be made a part of the record in the above-entitled cause.

In witness whereof, I have hereunto set my hand this 25th day of April, 1921.

CHAS. E. WOLVERTON,
Judge.

O. K.—HUMPHREYS,
U. S. Attorney,

State of Oregon,
County of Multnomah,—ss.

Due and timely service of the foregoing, and the receipt of a duly certified copy thereof as required by law is hereby accepted in Multnomah County, Oregon, on this 21st day of April, 1921.

LESTER W. HUMPHREYS,
United States Attorney.

Filed April 25, 1921. G. H. Marsh, Clerk. [37]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the direction of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 37, inclusive, constitute the transcript of record upon writ of error to review the judgment of the District Court of the United States for the District of Oregon in a cause in that court in which the United States of America is plaintiff and defendant in error and Olaf Hauge is defendant and plaintiff in error; that I have compared the foregoing transcript with the original record thereof and that the same is a true and complete transcript of the record of proceedings had in said court in said cause as the same appear of record and on file in my office

and in my custody. And I further certify that the cost of the foregoing transcript is $8.50, and that the same has been paid by the said plaintiff in error.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said court, at Portland, in said District, this 11th day of May, 1921.

[Seal] G. H. MARSH,
Clerk, United States District Court for the District of Oregon.

[Endorsed]: No. 3685. United States Circuit Court of Appeals for the Ninth Circuit. Olaf Hauge, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed May 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

District Court of the United States for the District of Oregon.

#C—9101.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF HAUGE,

Defendant.

Order Extending Time to and Including May 25, 1921, to File Record and Docket Cause.

Good cause being shown therefor, it is ordered that the time for plaintiff in error to file his transcript of record in the above-entitled cause with the clerk of the Circuit Court of Appeals of the United States of America for the Ninth Circuit, be and the same is hereby extended twenty days from the fifth day of May, 1921, to the twenty-fifth day of May, 1921.

Given under my hand this 21st day of April, 1921.

CHAS. E. WOLVERTON,

Judge.

I have no objections to above order.

LESTER W. HUMPHREYS,

United States Attorney.

State of Oregon,

County of Multnomah,—ss.

Due service of the foregoing order is hereby acknowledged by receiving a duly certified copy thereof from plaintiff in error's attorney.

LESTER W. HUMPHREYS,

United States Attorney.

[Endorsed]: #C—9101. District Court United States, District of Oregon. United States of America, Plaintiff, vs. Olaf Hauge, Defendant. Order Extending Time to File Transcript of Record. Filed Apr. 21, 1921. G. H. Marsh, Clerk.

No. 3685. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including May 25, 1921, to File Record and Docket Cause. Filed May 13, 1921. F. D. Monckton, Clerk.

No. 3685

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLAF HAUGE,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Attorneys of Record:
For Plaintiff in Error,
ERWIN J. ROWE,
Washington Bldg., Portland, Ore.
Defendant in Error,
LESTER W. HUMPHREYS,
U. S. Attorney.

OPENING BRIEF OF PLAINTIFF IN ERROR

This is a writ of error from the judgment and the proceeding prior thereto, in the United States District Court, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

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LESTER W. HUMPHREYS,
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OPENING BRIEF OF PLAINTIFF IN ERROR

This is a writ of error from the judgment and the proceeding prior thereto, in the United States District Court, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

STATEMENT OF CASE

On or about the 9th day of January, A. D. 1918, in accordance with the Selective Draft Laws of the United States of America made and provided, there was made out for or by the defendant, Olaf Hauge, a Questionaire, and in which Questionaire there were made several claims for exemption from the Military service of the United States of America, among which claims were the following::

First—Because he was a resident alien, not a citizen of the United States.

Second—A man whose wife or children are mainly dependent upon him for support.

Third—Person totally and permanently physically unfit for service.

Thereafter and prior to the seventeenth day of June, 1920, Olaf Hauge filed a petition for naturalization to become a citizen of the United States of America, which said petition came on regularly for a hearing in open Court on the Seventeenth day of June, 1920, at which hearing said Olaf Hauge was called as a witness, and was thereupon duly sworn.

He was thereupon questioned by the Naturalization Commissioner of the Oregon District as to whether or not he had claimed exemption from the Military service of the United States of America at the time of making out his questionnaire, on the grounds of being an alien. To which question the said Olaf Hauge replied that he had not claimed exemption.

Thereafter the Naturalization Commissioner for Oregon, learned from the Adjutant General of the War Department, that said Olaf Hauge had claimed exemption from the military service of the United States, and he thereupon had the United States Attorney for the District of Oregon, place the matter before the United States Grand Jury, which duly returned an indictment against Olaf Hauge for violation of Section number Eighty of the Federal Penal Code. To which indictment Olaf Hauge pleaded not guilty, and was thereafter on or about the 8th day of February, 1921, tried in the United States District Court, for the District of Oregon, before the Honorable Judge Bean, at which trial the jury disagreed and was thereupon dismissed.

Upon the re-trial of the cause before the Honorable Charles E. Wolverton, the Court made certain rulings to which the defendant duly objected and excepted.

Wherefore, this writ of error is had, it being assigned as error that the trial court erred in the following:

I.

Plaintiff called as a witness V. W. Tomlinson, who testified that he is a naturalization examiner, duly appointed, qualified and acting for the United States of America; that five days before the hearing for admission of the defendant as a citizen, he received from the Adjutant General of the Army information that the defendant had in his ques-

tionnaire claimed exemption from the military service, on the grounds of being an alien; that he thereupon filed in the District Court of the United States for the District of Oregon, a petition for a rehearing of the defendant's petition for naturalization, and that, in August, 1920, such rehearing was had in open court in the District Court of the United States for the District of Oregon, and that at such rehearing, the defendant took the witness stand in his own behalf and was thereupon sworn to tell the truth, and that the defendant at such rehearing, after having been sworn as a witness, testified that he had at the prior hearing on June 17, 1920, testified that he had not claimed exemption from the military service of the United States at the time of making out his questionnaire on the grounds of being an alien.

Whereupon counsel for the defendant objected to the testimony as to the statements made by the defendant under oath at the rehearing, on the grounds that same were incompetent, irrelevant and immaterial, which objection was there and then overruled, and the said witness was allowed to testify as above stated, to which ruling of the Court, the defendant then and there excepted, which exception was then and there allowed.

II.

The said witness, V. W. Tomlinson, naturalization examiner of the United States, being on the witness stand, testified that he is the Naturalization Examiner in charge at Portland, Oregon; that the

defendant filed a petition for naturalization in the District Court of the United States for the District of Oregon; that thereafter and prior to the said 17th day of June, 1920, said witness, as Naturalization Examiner, sent to the defendant by mail a typewritten or printed blank form of questions to be answered by the defendant as an applicant for naturalization. That the said witness has the custody of the records of the Bureau of Naturalization, at Portland, Oregon. That prior to the said 17th day of June, 1920, the defendant wrote answers in the aforesaid blank form, sent in by the Naturalization Examiner and returned the same by mail, to the said Naturalization Examiner; since which time the said Naturalization Examiner has had the said blank form, with the answers of the defendant written thereon, in his possession, and then had it in his possession.

Whereupon, the witness was asked to produce said blank form with the written answers of the defendant, and the plaintiff then and there offered said blank form with the written answers of the defendant in evidence.

Whereupon, defendant objected on the grounds that the said blank form with the written answers, was incompetent, irrelevant and immaterial.

The Court then and there overruled said objection and said blank form with the written answers was received in evidence and was marked Plaintiff's Exhibit 1, to which ruling of the Court the defendant then and there excepted, which

exception was then and there allowed.

III.

Plaintiff then offered in evidence a certified photostat copy of the defendant's Questionaire, which was marked "Plaintiff's Exhibit No. 2," which disclosed that the defendant had made in said Questionaire claims for exemption from the military service of the United States, on the ground of being a resident alien, not an enemy, who claims exemption, and on the grounds that he was a person totally and permanently physically or mentally unfit for military service; and on the grounds that he was a man whose wife and children are mainly dependent on his labor for support; and further.

That the following questions and answers were contained in said Questionaire in series VII thereof, as follows:

Q. Are you a citizen of the United States?

A. No.

Q. Do you claim exemption from military service because you are not a citizen?

A. Yes.

Q. Are you willing to return to your native country and enter its military service?

A. Yes.

Thereupon plaintiff rested its case.

Whereupon counsel for the defendant moved the court for a directed verdict, on the grounds that the plaintiff had failed to show that the question asked defendant at the hearing, to-wit, whether or not the defendant Olaf Hauge, had claimed

exemption from military service on the grounds of being an alien, was a competent, relevant or material question.

Thereupon the court did then and there refuse defendant's said motion, to which ruling the defendant did then and there propose exception to the said ruling of the court, which exception was then and there allowed.

IV.

The defendant then and there took the witness stand in his own behalf, and testified that his wife had filled out his Questionaire, except as to when defendant came to this country, on what ship, and to what port of entry, that he did not discuss with his said wife claims for exemption made in said questionaire. Defendant further testified that he personally took the Questionaire before the Notary Public, who administered to him the oath in the registrant's affidavit.

Whereupon defendant to maintain and prove his case called as a witness, Mrs. Inga Hauge, wife of the defendant, who was then and there present, ready, willing and able to testify, and who would have testified had she been allowed to, as follows, to-wit:

That she was, at the time a Questionaire was made out for the defendant, to-wit, on the 9th day of January, 1918, she was the wife of the said defendant Olaf Hauge.

That all the questions in said Questionaire were answered by her, with the exception of as to when

the defendant came to this country, on what ship, and to what port of entry. And further that the defendant did not know what answers she made to the questions in the said questionaire, or what claims were made for his exemption from the military service, and that she had not informed him as to what claims were made therein.

Whereupon counsel for plaintiff did then and there object to allowing the said Inga Hauge to testify, on the grounds that she was the wife of the defendant and was therefore incompetent as a witness; and the said judge did then and there refuse to allow said witness to testify.

Whereupon counsel for the defendant did then and there propose his objection and exception to the said ruling of the court, which exception was then and there allowed.

V.

Thereafter the defendant called as witnesses the following, to-wit:

Emil Straub, who testified that he knew the defendant, and that he knew his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

Henry Swales, who testified that he knew the defendant, that he knows his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

A. B. Benson, who testified that he knows the defendant, and has known him for a year and a half, that he knows his general reputation for truth

and veracity in the community in which he resides, and that such reputation is good.

George Cole, who testified that he has known the defendant for over a year; that he knows his reputation for truth and veracity in the community in which he resides, and that such reputation is good.

J. S. Theberge, who testified that he had known the defendant for over a year and a half, that he knows defendant's reputation for truth and veracity in the community in which he resides, and that such reputation is good.

Thereupon attorney for the defendant in order to maintain and prove the issues of his case, attempted to call as witnesses the following named witnesses: M. C. Hill, Mr. Rates, Mr. Guy, and Mr. Shields, who were present in the court room and who, had they been allowed to, testified that they had lived in the same locality as the defendant; that they had known the defendant for periods of from one to two years each, and that they knew the defendant's general reputation for truth and veracity in the community in which he resides, and that such reputation of the defendant is good.

Thereupon the judge presiding at such hearing asked the defendant's counsel if the testimony of the said witnesses would be to the same effect as that of the six witnesses to defendant's reputation, as to his truth and veracity, who had just been called, to which defendant's counsel responded that they would.

Whereupon, the said judge did then and there refuse to allow the said persons to testify, on the grounds that the defendant had already called six prior witnesses on the same point and that further accumulative testimony as to the defendant's reputation for truth and veracity would not be permitted, to which ruling of the court the defendant then and there objected, on the grounds that the said court did not have the right to limit the number of witnesses as to the defendant's general reputation for truth and veracity, and the defendant then and there saved an exception, which exception was then and there allowed.

POINTS AND AUTHORITIES.

I.

The mere fact that testimony has been given by the defendant Hauge at a former hearing, is no grounds for admitting his declarations or admissions made thereat.

Savannah etc. Ry. Co. vs. Flannagan, 82 Ga. 579.

St. Joseph vs. Union Ry Co., 116 Mo. 636.

II.

The mere statement of V. W. Tomlinson that he mailed a blank form of questions and answers to defendant, and thereafter it was returned to him through the mail, was not sufficient proof for admitting the reply letter.

Smith vs. Shoemaker, 17 Wall. 630.

Butterworth and Lowe vs. Cathcart, 168 Ala. 262.

Kvale vs. Keane, 39 N. D. 560.

In order for the reply letter to have been admissable was necessary for the prosecution to have shown that the prior letter was deposited in the postoffice or some department thereof, properly addressed and stamped with sufficient postage.

Kvale vs. Keane, 39 N. D. 560.

Trezevant vs. Powell, 61 Tex. Civ. App. 449.

III.

It was necessary for the prosecution to have shown that the question as to whether defendant claimed exemption from military service was a relevant, material question.

Coyne vs. People, 124 Ill. 17.

State vs. Shupe, 16 Ia. 36.

Shevalier vs. State, 85 Neb. 366.

Dallagiovanna vs. State, 69 Wash. 85.

McDonough vs. State, 47 Texas Crim. 227.

Chamberlain vs. People, 23 N. Y. 85.

IV.

The wife of a defendant is a competent witness unless her testimony is offered to contradict a government witness.

Jin Fuey Moy vs. U. S., 254 U. S. ——.

V.

In all criminal actions, the accused is entitled to introduce evidence to the effect that, up to the time when the crime with which he is charged was committed, he bore in the community in which he lived a good character (reputation).

Cancemi vs. People, 16 N. Y. 501.

State vs. Northrup, 48 Iowa 583.
Edgington vs. U. S., 164 U. S. 361.
Thornton vs. State, 113 Ala. 43.
People vs. Garbutt, 17 Mich. 9.
Durham vs. State, 128 Tenn. 636.
State vs. Foster, 130 N. C. 666.

The prevailing character of the party's mind, as evinced by the previous habits of his life, is a material element in discovering the intent in the instance in question. Being of good character, it is improbable that he would have committed the crime with which he is charged.

Latimer vs. State, 55 Neb. 609.
State vs. Dickerson, 77 Ohio St. 34.

Evidence of good character must be weighed and considered by the jury in connection with the other testimony in the case, and is regarded as evidence of a substantive fact, like any other evidence tending to establish innocence.

Com. vs. Aston, 227 Pa. 106.
People vs. Friedland, 2 App. Div. 332; 37 N. Y. Supp. 974.

No matter how conclusive the other testimony may be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe in view of the improbability that a person of such character would be guilty of the offense charged. The witnesses excluded therefore should have been allowed to testify, for this was a question for the jury and not the court.

Remson vs. People, 43 N. Y. 9.

Vol. 10 A. L. R., Pages 9, 10, 11, 12, 13.
Vol. 8 R. C. L., Page 207.
Vol. 10 R. C. L., Page 948, Sections 120.

ARGUMENT

The mere fact that testimony has been given by the defendant at a former trial (the re-hearing), and in that proceedings he made certain admissions or declarations is no grounds for admitting those admissions or declarations in evidence at a later trial.

The witness must be produced under such circumstance just as much as a witness testifying De Novo. The prosecution should have asked the defendant as regards his declarations or admissions made at the re-hearing, and then had he testified contrary to truth and fact to have produced witnesses to impeach him. Having first laid a foundation of time, place and persons present.

II.

As stated by the court in the case of Kvale vs. Keane, 39 N. D. 560:: "We are of the opinion that it is a general rule that where a letter is offered in evidence, which letter is claimed to be an answer to a previous letter, before such letter which is the answer can be received in evidence, there must be proof that the previous letter was written and mailed."

In order to permit proof based upon the correspondence, he must bring himself strictly within this rule. "It is certain that the rule should not be extended." ' 'To do so would afford too great an

opportunity for fabrication and undue advantage." "We are of the opinion that where a person undertakes to show that he sent another a letter by mail, no presumption will arise that the letter so sent was received by the person to whom it was addressed, unless it is shown that it was deposited in the postoffice, or some department thereof, as, for instance, in a mail box on a rural route, and that such letter was properly addressed and stamped with sufficient postage."

"It is conceivable that a person could write a letter to another and deposit it in the postoffice without stamping it and without placing postage thereon, and truthfully claim that he had addressed the letter to the party at his proper address and deposited it in the United States mail."

Although it is true that the department of Naturalization is authorized to use a franked envelope, it was not shown by the prosecution that such was used. The presumption that such was used, if such a presumption were indulged in, would be met with and overcome with the presumption of the defendant's innocence.

Again is it not conceivable, although such an envelope had been used, that through defective printing the franking had been omitted? We all realize that printers are not at all infallible.

III.

The weight of authority is that the false testimony of the witness, in order to make it perjury, must be material.

Section number eighty of the Federal Penal Code in part. * * * Or who in a naturalization proceedings shall procure or give false testimony, as to any material fact.

It was therefore incumbent upon the prosecution to have shown that the question as to whether or not the defendant had claimed exemption from the military service of the United States, in his questionnaire, was a relevant, material question. There is no presumption that it was; and there most assuredly is no statute of our laws which makes such a question a material one.

True, under the Federal Statutes at Large, Laws 1918, Session II, Chapter 143, Sub-Chapter XII, which is as follows:

> Section IV. * * * That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States, shall be relieved from liability to military service upon his making a declaration in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.

Under this section and the regulations prescribed by the President, it was necessary for a neutral alien to file an affidavit declaring the withdrawal of his declaration of intentions.

Defendant Hauge did not file an affidavit in accordance with the above section or the regulations of the President nor in any way show an intent to withdraw his declaration of intention to become a citizen.

The wording of the statute is clear, to withdraw his declaration of intentions, by no sense of the imagination or moral perception can we see how such a statute would cover a case like the one under consideration, for this defendant did not cancel or withdraw his declaration of intention, but retained it and all rights thereunder.

Again it must be remembered that the defendant's questionnaire was made out on the 8th day of January, 1918, and that the above statute was not passed until May, 1918. We surely have better judgment than to think that an intelligent body of America's most eminent men like Congress would pass a law like the above with the intention of considering any neutral alien, who had claimed exemption by reason of his alienage, in a questionnaire made prior to the passage of the statute, had cancelled his declaration of intention and should be thereby barred forever from becoming a citizen. Such if that were their intention it would have been an ex post facto law. This court in considering a statute will construe it, and presume in favor of the statute being valid, rather than in favor of it's being invalid and unconstitutional.

This statute then would not have made the

testimony of the defendant relevant or material, and no other testimony having been offered to show that it was relevant or material, the court erred in refusing defendant's motion for a directed verdict.

IV.

It is true under the old days of the common law procedure of "all law and no justice," that a man's wife could not be a witness either for or against her husband. Under the code procedure however it is a well recognized rule that a wife is a competent witness in her husband's behálf. In the case of Jin Fuey Moy vs. U. S., 254 U. S. —, our Supreme Court said a wife could not be a witness for her husband to contradict a government witness. In this case, however, defendant's wife was not called nor would she have testified to contradict a government witness; but rather for the purpose of corroborating the testimony of her husband, who claimed, and on which his sole defense rested, that his questionnaire was made and filled out by his wife, and that he did not know what claims had been made therein for his exemption.

If this be true, and we have every reason to believe that it is true, what defense could he make without her testimony? NONE.

And what, if any, was the reason for a rule so radical? The mere fact that the wife of a defendant was an interested party in the outcome of the cause, and should therefore be excluded. But by this same logic was a man's children, father,

mother or other blood relatives excluded? They were not. Does this then not vitiate the very reason itself?

"Reason is the life of law."—Coke.

Is it reason to say that in a case where all the circumstances point to the guilt of the accused, suppose that he is charged with murder, and claims the alibi that he was at home in bed with his wife, to say that she, the only person in God's world to testify in his behalf, could not utter one word to save her innocent mate from a murderer's fate? If such it be, then there was no error in the ruling of the trial court in not allowing her, his only witness, to testify. For although her testimony might have saved him, alas, she is his wife, faithful and true, and therefore disqualified; but, alas, were she a consort, ah! the rule is different.

Are we to understand that our laws are as expressed in the Atlantic Monthly for December, 1920, at page 863, reprinted in Oregon Law Review, April, 1921, page 24:

> "On reading Mr. Bartell's 'The Newer Justice,' in your September number, I was strongly reminded of the reply of a professor in the ——law school. To my contention that a certain ruling of the courts, a well settled precedent, was not just, said the eminent jurist with a sigh, 'If you want JUSTICE, go to the DIVINITY school. We study law here.' "

This attitude was no doubt reflected into mod-

ern law, which goes by the "rules of the game." Let us trust, however, it will no longer continue.

V.

In all criminal actions the accused is entitled to introduce evidence to the effect that, up to the time when the crime was committed, he bore in the community in which he resided a good character (reputation). For the prevailing character of the party's mind as evinced by the previous habits of his life, is a material element in discovering that intent in the instance in question. Being of good character it is improbable that he would have committed the crime with which he is charged.

Evidence of good character must be weighed and considered by the jury in connection with the other testimony of the case, and is regarded as evidence of a substantive fact, like any other evidence in the case tending to establish innocence. For no matter how conclusive the other evidence may have been the evidence of good character may have been such as to have created a doubt in the minds of the jury of the guilt of the accused. The number of witnesses on character or the amount of weight to be given them was not a question for the court but rather for the jury.

Possibly the jury were not impressed with the first six witnesses of character, whereas the last six might have made a great impression on them.

CONCLUSION

This case presents a record for your review in which the defendant was not granted a fair and

impartial trial. Where evidence was admitted and other evidence excluded, that should not have been.

This review being done in the careful manner in which this court always disposes of its cases, must result in a reversal of the judgment.

Respectfully submitted,

ERWIN J. ROWE,

Attorney for Plaintiff in Error.

No. 3685

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF HAUGE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

LESTER W. HUMPHREYS,
United States Attorney for Oregon,
For Defendant in Error.

No. 3685

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF HAUGE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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United States Attorney for Oregon,
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INDEX.

STATEMENT

This is a proceeding to review a conviction for false swearing at a naturalization hearing.

Olaf Hauge was a resident alien, not an enemy, who claimed exemption from military service on that ground. He was admitted to citizenship at a hearing held June 17, 1920, in the United States District Court of Portland. At this hearing, Hauge testified that he had not claimed exemption on the ground of alienage. Soon after, the Naturalization Examiner discovered that Hauge had, in fact, claimed such exemption. Thereupon a rehearing on Hauge's application for citizenship was asked and allowed.

The rehearing was held in August, 1920. Hauge again took the witness stand and admitted under oath that his testimony on June 17, 1920, was to the effect that he had not claimed exemption.

Afterwards he was indicted for swearing falsely at the original hearing as to his claim for exemption. At the trial there was an issue as to what Hauge had said under oath at that original hearing. There was direct testimony on this point from the Clerk of the Court. In corroboration evidence was offered of Hauge's admission under oath at the rehearing. That evidence was received and its reception is assigned as error.

There was offered also at the trial, a statement in writing made by Hauge to the Naturalization

Examiner in connection with his petition for naturalization. In this writing, Hauge stated again that he had not claimed exemption on the ground of alienage. This was received as "Exhibit 1" and its admission is assigned as error.

When the government rested, defendant moved for a directed verdict on the ground that it was not material at the naturalization hearing whether defendant had claimed exemption as an alien. This motion was denied and the ruling is assigned as error.

Defendant's wife was refused permission to testify in his behalf and this ruling is assigned as error.

After defendant had produced six witnesses who said his reputation for truth and veracity was good, the Court refused to permit further cumulative testimony on this point and such prospective witnesses were excluded, and this ruling is assigned as error.

POINTS AND AUTHORITIES

I.

(a) Admissions against the interest of a defendant are competent against him at a criminal trial.

16 C. J. 626-629.
Pass vs. United States, 256 Fed. 731-732.
Wine vs. U. S., 260 Fed. 911.
Adamson vs. U. S., 184 Fed. 714-715.

(b) Such admissions are not within the rules for the impeachment of witnesses.

16 C. J. 626.
Adamson vs. U. S., 184 Fed. 714-715 (Certierari denied 220 U. S. 612).

II.

An alien, not an enemy, who had declared his intention to become a citizen, and then claimed exemption from the military service on the ground of being an alien, is not eligible to citizenship.

In re Tomarchio, 269 Fed. 400-408-411.
In re Silberschutz, 269 Fed. 398-399.
In re Loen, 262 Fed. 166-167.
In re Miegel, 272, Fed. 688-696.
In re Rubin, 272 Fed. 697.

III.

The wife of a defendant is not a competent witness in his behalf, irrespective of the kind of testimony she might give.

Jin Fuey Moy vs. U. S., 254 U. S. —; 41 Sup. Ct. Rep. 98-100.
Hendrix vs. U. S., 219 U. S., 79-91.

IV.

It is within the discretion of the trial court to exclude evidence which is merely cumulative.

Samuels vs. U. S., 232 Fed. 536-543 .
O'Hara vs. U. S., 6 Fed. 551-555.
Chapa vs. U. S., 261 Fed. 775-776.

ARGUMENT.

I.

The Admissions of Defendant.

Defendant was indicted for false swearing at a naturalization hearing. He pleaded not guilty. The government was thereby required to prove its case. The indictment (Trans. 6) charges that defendant falsely swore he "did not make or assert in said questionnaire any claim for exemption from the military service of the United States by virtue of his alienage, foreign citizenship, or the fact that he was not a citizen of the United States."

The prosecution therefore had to prove (1) that defendant testified as charged in the indictment; and (2) that such testimony was false. In order to prove that defendant so testified, the Government relied, first, on the direct evidence of the Clerk of the District Court, and second, on the admissions of the

defendant. These admissions were solemn statements under oath in open court on the occasion of the rehearing of defendant's naturalization petition. At this rehearing, defendant on the witness stand admitted that at the original hearing, he had testified that he had not claimed exemption from military service on the ground of alienage. (Trans. 24).

The courts uniformly hold such admissions to be competent against a defendant. Such admissions are not within the rules for the impeachment of witnesses. Authority might be cited interminably in support of this proposition. The rule has been so often stated and so generally accepted that I believe it will be sufficient to quote the rule as stated in Corpus Juris under the title Criminal Law, 16 C. J. 626 (Section 1243).

> "Statements and declarations by accused, before or after the commission of the crime, although not amounting to a confession, but from which, in connection with other evidence of surrounding circumstances, an inference of guilt may be drawn, are admissible against him as admissions. Such statements and declarations are original evidence, and may be introduced without laying the foundation which is necessary when it is sought to impeach a witness."

Again, it is said in 16 C. J. 629 (Section 1248.)

> "In the absence of statutory regulation of the subject, testimony and written statements given

voluntarily or made by a party or witness in a judicial proceeding are, as admissions, competent against him in a trial of any issue in a criminal case to which they are pertinent."

In the case of Pass vs. U. S. (9th C. C. A.), 256 Fed. 731-732, the principle is recognized and applied.

In case of Wine vs. U. S. (8th C. C. A.), 260 Fed. 911, objection was made to the introduction of letters written by defendant, and the court said:

"These letters contain admissions of the defendant against his interest at this trial and there was no error in over-ruling the objection to their admission."

In the case of Adamson vs. U. S. (8th C. C. A.), 184 Fed. 714-715, objection was made to proving a statement of one of the defendants. The court said:

"We need not stop to consider this as impeaching testimony. The statements by Sullivan were against interest, and could have been proved without his previous denial."

A writ of certiorari in this case was denied by the Supreme Court, 220 U. S. 612.

"EXHIBIT 1"

Much is said by defendant's counsel about the written answers of Hauge to the naturalization examiner (Exhibit 1). This is a writing containing statements against the interest of the defendant in this prosecution; it is an act in preparation of the

perjury he committed; and shows a deliberate purpose to achieve naturalization by deception.

It is a form used by the Department of Labor in the ordinary course of naturalization proceedings. Hauge was an applicant for citizenship; he regularly filed a petition for naturalization. The naturalization examiner in charge at Portland is Mr. Tomlinson. Upon the filing of Hauge's petition for naturalization, and before the hearing, Mr. Tomlinson "as Naturalization Examiner, sent to the defendant, by mail, a typewritten or printed blank form of questions to be answered by the defendant as an applicant for naturalization. . . . Prior to the 17th day of June, 1920, the defendant wrote answers in the aforesaid blank form sent him by the Naturalization Examiner and returned the same by mail to the Naturalization Examiner" (Trans. 25).

This form has defendant's signature. His signature appears frequently on the questionnaire (Exhibit 2). There was abundant opportunity for the jury to compare the signatures, if there were any question as to the validity of Exhibit 1.

The fact that defendant wrote the answers in Exhibit 1 and transmitted it to the Naturalization Examiner is sufficiently shown by the foregoing. In Exhibit 1, over the defendant's signature, are the following questions and answers:

"Did you file a questionnaire with any draft

board during the war?

"Yes.

"Did you claim exemption from the military service because you were not a citizen of the United States?

"No."

An issue before the jury was whether defendant testified on June 17, 1920, that he had not claimed exemption. On this issue, Exhibit 1 corroborates the testimony of the clerk of the court. It is a preliminary writing made by defendant in the course of the same naturalization proceeding, preparatory to his hearing before the court. It shows an act of defendant preparatory to his perjury in open court, and touches the probabilities of the case—for it is not likely that defendant, in preparing for his hearing, would say in writing to the examiner in charge that he had not claimed exemption, and would afterward, in open court in the presence of the examiner, tell a different story on the witness stand. It also shows knowledge of defendant, and precludes the possibility that his false testimony was attributable to a momentary lapse of memory. It shows that defendant was ready to accomplish his naturalization by deception as to his claim for exemption.

I submit, therefore, that Exhibit 1 is competent because it is shown to be in defendant's handwriting and to be signed by him; and to have been done in the

ordinary course of the naturalization proceeding here in question. And it is relevant and material because it corroborates the evidence of the Government and tends to show, taken in connection with the questionnaire (Exhibit 2), that defendant's testimony was knowingly false. Whether Exhibit 1 was sent by mail, or the postage prepaid, or the envelope franked, is quite beside the point. No question touching the use of the mail arises in this case. We do not have to call to aid any presumptions as to deposit of mail matter and its regular delivery in due course. Exhibit 1 was filled out and signed by defendant, and delivered to the examiner. It would have had the same effect had Hauge filled it out in the office of the examiner and left it there.

II.

Was the Claim for Exemption Material?

The opportunity to become a citizen of the United States is a privilege and not a right. The privilege of citizenship is extended to those aliens, otherwise qualified, who are attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. It is axiomatic that he who is inspired with that attachment for this country which citizenship requires, is also willing to serve and defend it. If the willingness to serve is wanting, it follows that the good disposi-

tion toward the country's good order and happiness is absent. Hauge was unwilling to serve. When America called for defenders, he hid from her behind his alien birth; and in order to be sure of escaping military service, he added a couple of other claims for exemption to that of alienage. (Trans. 26, III.)

In the case of In re Tomarchio, 269 Fed. 400-408, the court quotes the act of Congress, which is quoted by Hauge's counsel at page 15 of his brief, and then said:

> "But this was merely declaratory of the law. It neither added to, nor detracted from, the power inherent in the courts under the naturalization laws to hold a plea of alienage in bar to the performance of military service operated likewise as a bar to admission to citizenship. The bona fides of the intent and desire of an applicant for American citizenship constitutes one of the salient and material issues involved in a naturalization proceeding. The attitude, conduct and actions of a candidate, as disclosed in his questionnaire, are matters that must be taken judicial notice of, in a naturalization proceeding; and where in such questionnaire the petitioner is shown to have anywhere claimed exemption from military service on the ground of alienage, he is not eligible or qualified to be, nor should be admitted to American citizenship. The courts seem to be in more or less uniformity as to this.

Judge Dyer said further, in the same case, page 411:

> "As to friendly aliens, nationals of the countries associated with the United States in the World War, and as to neutral aliens, any plea of alienage set up by them must be held to be a deliberate attempt to evade military service altogether. . . . It is immaterial for naturalization purposes where in the questionnaire such claim was set up, or the manner in which it was asserted. If made by him anywhere, in any manner, that fact must necessitate the denial of the application for citizenship."

The same judge held in Re Silberschutz, 269 Federal, 398-399, that an Austro-Hungarian who had declared his intention to become a citizen in 1915 and who claimed exemption from military service on the ground that he was an alien enemy, could not be admitted to citizenship. The court said:

> "Further, the assertion by the petitioner of this claim for exemption as an alien establishes that he was not, during all of the period of five years immediately preceding the date of filing of his petition for naturalization, attached to the principles of the Constitution of the United States of America, and that he was not well disposed to the good order and happiness of the same, and that he was not willing in the hour of our national peril to support and defend the Constitution of the United States of America

against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

In the case of In Re Loen, 262 Federal, 166-167, a native of Norway had declared his intention to become a citizen. He took advantage of the privilege created by the Act of July 9, 1918, and surrendered his declaration of intention for the purpose of evading military service. He afterward served in the Army at a training camp and later applied for citizenship. The court said:

"In the instant case, the applicant had declared his intention to become a citizen, and under oath declared his willingness to renounce all allegiance to foreign sovereignty. By that oath he solemnly swore it to be his bona fide intention to transfer his citizenship and allegiance. This implied willingness and intention to defend the flag and to support the Constitution and laws of the United States; and when invitation was extended, he declined to do so, thereby repudiating his declared intention, and asserted under oath preference for his native country. He failed to meet the test. Nothing appears to indicate a change of sentiment or feeling of regret.

"Citizenship and allegiance to this country are made of sterner stuff. He is not fitted to take the oath of allegiance. Interpretation of the oath of allegiance is more than a mere formula of words. It is the translation of the alien applicant for citizenship from foreign language,

foreign history, foreign ideals and foreign loyalty into a living character of our language, of our history, of our life, of our ideals, and loyalty to our flag. It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its constitution and laws, which moves him in sincerity to dedicate his life to its service, and conscientiously agree to defend it against all enemies and the implanting in his soul of a sincere determination that in the hour of danger or attack upon the constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. Any person unwilling to pledge his hands, his heart, his life, to the service and preservation of the government of the United States, first and always, is unworthy to be admitted to citizenship.

"The proof does not show the applicant's loyalty to our flag and his willingness to defend it. This applicant, when the flag was assaulted by a foreign foe, was unceasing in his efforts to evade military service in a conflict forced upon this country, and did nothing which would indicate that he was attached to the principles of the Constitution of the United States, carrying forward liberty, equality, justice and humanity. It was not until all danger was past, when the armistice was signed, that he made up his mind to again knock at the door of this country, and ask to be admitted to citizenship.

"This application is denied with prejudice."

In the case of In re Miegel, 272 Fed. 688-696, Judge Tuttle, speaking of aliens, not enemy aliens, said:

> "Not only were such aliens free to avail themselves of the opportunity and right to take their places among the ranks of the military defenders of this country, but it was their solemn duty, under the law and according to all of the dictates of patriotism, to respond to the call of the nation, in its great emergency, to take up arms in its defense. No argument is needed to make it clear and obvious that an American citizen who is unwilling to fight for his country, at whatever sacrifice to himself, is unfit to be an American citizen. . . .
>
> "All this is applicable, with equal force, to the alien who, having solemnly declared his intention to become a citizen of this country, and having been granted an opportunity, and indeed required, to fulfill the most important and essential obligation that a citizen or prospective citizen owes to the nation when summoned to defend it from its enemies on the field of battle, fails in this supreme test of loyalty, and not only attempts to escape from such obligation but to present a false pretext for such attempted escape. That such an alien is not attached to the principles of the Constitution of the United States and is not well disposed to the good order and happiness of the same is too plain for fur-

ther discussion. An alien seeking citizenship, who thus shows that he is not willing to assume and bear the duties and obligations of that status, as well as to enjoy its rights and privileges, is not qualified or entitled to become an American citizen."

It thus appears, as a matter of law, that the question whether Hauge had claimed exemption was material; because had the truth been disclosed, it would have revealed Hauge to be ineligible to citizenship, and his application would have been denied on the original hearing. Therefore his testimony was false as to a material fact; and the motion for a directed verdict was properly denied.

IV.

Defendant's Wife as a Witness.

The wife of a defendant is not a competent witness. This is held squarely by the Supreme Court in Jin Fuey Moy vs. U. S., 254 U. S. —; 41 Sup. Ct. Rep. 98-100. Defendant's counsel in his brief has misstated the ruling of the Supreme Court (Brief 11, IV). Counsel states, as the ruling of the court, the contention made before the court in behalf of Jin Fuey Moy, and rejected by the court. The language of the Supreme Court is as follows:

"But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded she

> was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by Sec. 858, Rev. Stat. U. S., being confined to civil actions. Logan vs. U. S. 144 U. S. 263-299-302; Hendrix vs. U. S. 219 U. S. 79-91. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not 'in behalf of her husband,' that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the Government who had testified to certain matters as having transpired in her presence. **The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event and applies irrespective of the kind of testimony she might give."**

In the case of Hendrix vs. United States, 219 U. S., 79-91, defendant was convicted of murder and prosecuted an appeal to the Supreme Court. The Court said:

> "It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were vitally material to his defense. The ruling was not error."

Counsel goes from eloquence to vehemence in discussing the reasonableness of this rule of law. It does

not appear that it is in order to discuss here the reasonableness of the law as declared by the Supreme Court of the United States.

V.

Limiting the Number of Witnesses.

The only remaining assignment of error relates to the action of the court in limiting the number of witnesses who would testify that defendant's reputation for truth and veracity was good. It is a fundamental rule of law that it is within the discretion of the trial court to exclude evidence which is merely cumulative.

In the case of Samuels vs. United States, 232 Federal, 536-543, there was a prosecution for fraudulent use of the mails. The Court limited the number of witnesses offered by defendant to prove that they had been cured by defendant's preparation. The Court said:

> "At best this evidence was merely cumulative and it was a matter of discretion for the trial judge to determine whether any more witnesses would be permitted to testify after forty-one witnesses had done so. This is a matter which must be left to the discretion of the trial judge and unless it appears clearly that there had been an abuse of the discretion which was prejudicial to the defendant, the Appellate Court will not consider it cause for reversal."

In the case of O'Hara vs. United States, 6th

Federal, 551-555, it is held that it was within the discretion of the trial court to limit the number of defense witnesses to be subpoenaed at the Government's expense to four on each particular point named in defendant's praecipe.

In the case of Chapa vs. United States, 5th C. C. A., 261 Federal, 775-776, there was a prosecution for fraudulent use of the mail. The Court said:

> "The seventh assignment of error is to the refusal of the Court to permit more than thirteen witnesses for the defendants to testify that they had been cured by defendants' daughter. This was material on the ground of defendants' good faith as showing their belief in the possession by their daughter of occult power claimed for her. About 150 witnesses were tendered on this point. Evidence offered was purely cumulative. . . . It is discretionary with a trial court to limit the amount of cumulative evidence and in this case it does not appear that this discretion was abused."

The question, therefore, is, was there an abuse of discretion in limiting defendant's character witnesses to six. The records make no showing of abuse. The four witnesses who were excluded would have testified to acquaintance with defendant over the same period of time as that described by the witnesses who testified and also that his reputation for truth and veracity was good.

It cannot be said as a matter of law that there was an abuse of discretion. So far as the record discloses, defendant suffered no injury. Defendant's reputation was not attacked by the government. Certainly defendant could not be prejudiced by cutting off cumulative testimony on a point which was not disputed.

Respectfully submitted,

LESTER W. HUMPHREYS,

United States Attorney.

No. 3686

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,
Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3686

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,
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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILLSEN, JAMES McLENNAN, EVERET SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,

Libelants,

vs.

UNITED STATES OF AMERICA,

Respondent.

Praecipe for Transcript on Appeal.

To the Clerk of the Southern Division of the United States District Court, in and for the Northern District of California.

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal and assignment of errors heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Statement under Admiralty Rule 4.

2. All of the pleadings with the exhibits and interrogatories and answers to interrogatories annexed thereto.
3. All of the testimony and other proofs including stipulations as to the facts, adduced in the cause.
4. The opinion of the Court.
5. The final decree. [1*]
6. The petition for appeal, order allowing appeal, and notice of appeal.
7. The assignment of errors.
8. The supersedeas.
9. The citation on appeal.
10. The clerk's minutes.
11. This praecipe.
12. Clerk's certificate to transcript.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days after the filing of the notice of appeal in said cause.

Dated this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney.
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondents.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

Service of a copy of the foregoing praecipe for transcript of record in the above-entitled cause is hereby admitted this 14th day of April, 1921.

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: Otis E. Miles, E. M. La Casa, John Nelson, T. M. Thompson, Manuel Fernandez, J. Rodrigues, A. E. Awort, Mark Kobz, R. Redd, G. H. Marsh, C. Carlson, T. Nilsen, James McLennan, Evert Seppa, Fred Taucher, John Anderson, J. W. Jakobssen, E. C. Hansen, J. E. Norman, K. K. Pollard and O. Lund.

Respondent: The United States of America. [3]

PROCTORS.

For Libelants: H. W. HUTTON, Esq., San Francisco, Calif.

For Respondent: FRANK M. SILVA, Esq., United States Attorney, FREDERICK MILVERTON, Esq., Special Assistant United States Attorney in Admiralty, San Francisco.

PROCEEDINGS.

1920.

May 11. Filed libel for salvage with interrogatories attached.

August 27. Filed answer of respondent, with answers to interrogatories; also, interrogatories propounded to libelants.

September 10. Filed libelant's answers to respondent's interrogatories.

November 5. Hearing was this day had, before the Honorable, MAURICE T. DOOLING, Judge, and was ordered submitted.

1921.

February 18. Filed opinion in which it was ordered that each libelant recover a sum equal to two months' pay.

March 1. Filed final decree.

April 15. Filed notice of appeal.
Filed petition for appeal.
Filed assignment of errors.
Filed supersedeas.
Filed citation on appeal.

18. Filed stipulation and order that original exhibits be transmitted to U. S. Circuit Court of Appeals. [4]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. E. NORMAN, and K. K. POLLARD, and O. LUND,
Libelants,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

(Libel for Salvage and Interrogatories.)

To the Honorable M. T. DOOLING, Judge of said Court:

The libel of the libelants, above-named seamen, against the United States of America, stockholder and a nation, in a cause of salvage, civil and maritime, alleges as follows:

I.

That on all of the dates and times herein mentioned, United States Shipping Board and Emergency Fleet Corporation were and now are corporations organized and existing under and by virtue of the laws of the Congress of the United States of America, and on all of said dates and times, The United States of [5] America, defendant herein, owned all of the outstanding capital stock of each of said corporations each thereof being a capital stock corporation.

II.

That on all of said dates and times, one of the said corporations mentioned in paragraph I hereof but which one libelants do not know was the owner of those two certain steam vessels, each of which was employed as a merchant vessel of the United States, one being named, known and called the "West Inskip," and the other being named, known and called the "Deuel."

III.

That heretofore and during the month of November, 1919, libelants each shipped as seamen on said vessel "West Inskip," on a voyage from San Francisco to Asiatic ports and return, and each thereof regularly signed shipping articles for such voyage, before the United States Shipping Commissioner for the Port of San Francisco, and each thereof went on board and into the service of said vessel in accordance with such shipping articles, during said month of November, 1919, in the following

capacities, and at the following rates of wages, to wit:

Otis E. Weber, E. M. La Casa and John Nelson as oilers, at the wages of $90.00 per month; T. M. Thompson, Manuel Fernandez, J. Rodrigues, Mark Kobz, R. Redd, and G. H. Marsh, as firemen, at the wages of $90.00 per month; A. F. Awort, as deck engineer, at the wages of $105.00 per month; C. Carlson, T. Nilson, James McLennan, Evert Seppa, Fred Taucher, John Andersen, J. M. Jakobssen, E. C. Hansen and O. Lund as sailors, at the wages of $90.00 per month; J. E. Norman, as carpenter, at the wages of $105.00 per month, and K. K. Pollard as an ordinary seaman, at the wages of $65.00 per month. [6]

IV.

That said vessel "West Inskip" with libelants so on board left the said port of San Francisco and thereafter arrived at Yokohama, Japan, and having transacted such business there as was necessary left the said port for the further prosecution of her said voyage, on the 14th day of December, 1919; that about three hours after said vessel left said Yokohama the said vessel "Deuel" was sighted from the said "West Inskip," the said "Deuel" then being aground on a reef, with a hole in her bottom and in a dangerous and perilous condition, with a large and valuable cargo on board, all of which was in great danger of total loss; that the master of said "West Inskip" proceeded with said vessel to the assistance of the said "Deuel" and her cargo, and after continuous efforts of the said "West Inskip"

and her crew, to wit, the libelants and also the officers of said "West Inskip," the said "Deuel" was pulled off of the said reef and said vessel and what remained of her cargo was saved from total loss; that during said salving of said vessel and cargo, libelants who could be spared from said "West Inskip" went on board said "Deuel" and assisted in throwing overboard a large portion of a deckload of cargo carried by said "Deuel" and moving a portion of what remained to the after-end of said vessel so as to lighten the forward part of said vessel that had come in contact with said reef, and lines were stretched from said "West Inskip" to said "Deuel" on which said "West Inskip" exerted a strain and other necessary efforts were made, all of which resulted in the saving of said "Deuel" and the remaining portion of her cargo as aforesaid from total loss.

V.

That libelants do not know who the owner of said cargo either saved or thrown overboard was, nor do they know the value [7] of either the salved or destroyed parts thereof, but allege that salvage will be paid to defendant as owner of said "West Inskip" by the owner or owners of the saved portion of said cargo if the same has not already been paid.

VI.

That libelants not at this time knowing the value of said salved property are unable to definitely state what would be a reasonable award to be made to each for his services aforesaid, but from such information as they have allege that not less than

one thousand ($1,000.00) dollars to each of the libelants would be reasonable award to be made for such services, and larger if the value of such salved property when such values are ascertained herein warrants it.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

WHEREFORE libelants pray that defendant *may required* to answer under oath the premises aforesaid, and the interrogatories attached hereto, and that this Honorable Court will be pleased to make a reasonable salvage award to each of the libelants for his services aforesaid, with costs, and that libelants may have such other and further relief as the Court is competent to give in the premises.

All of the Libelants in the Caption Hereof Named.

By H. W. HUTTON,
Their Proctor,

H. W. HUTTON,
Proctor for Libelants. [8]

United States of America,
Northern District of California,—ss.

H. W. Hutton, being first duly sworn, deposes and says as follows:

I am proctor for the libelants in the caption hereof named, each of said libelants is absent from the city and county of San Francisco, on voyages to sea, or are more than one hundred miles away from said San Francisco, where I have my office and

reside, and I therefore for that reason, make this verification on their and each of their behalf; the matters contained in the foregoing libel were drawn up by me from information given to me by the libelants, and the same are true according to the best of my knowledge, information and belief.

H. W. HUTTON.

Subscribed and sworn to before me this 11th day of May, 1920.

[Seal] T. L. BALDWIN,

Deputy Clerk U. S. District Court, Northern District of California. [9]

Interrogatories (Propounded to Respondent).

1. Who was the owner of the "Deuel" between the 13th and 17th days of December, 1919?

2. Who owned her cargo?

3. What was the value of the "Deuel" when she struck the reef on the coast of Japan, December 14th, 1919,—that is to say, immediately before she so struck?

3. What did it cost to repair her?

4. What was her value after such repair?

5. What was the value of the cargo thrown overboard in salving the "Deuel"?

6. What was the value of the salved portion of her cargo?

7. Has any effort been made to collect salvage from the salved portion of the cargo of said "Deuel"? If so, what effort?

8. Has any salvage been paid by said salved cargo? If so, how much?

9. If any salvage money has been paid for salving said salved portion of the cargo of the "Deuel," to whom was it paid?

10. Has any adjustment been made of the amount that the "Deuel" should pay to the owners of the "West Inskip" for the salvage services rendered by the "West Inskip" to the "Deuel" on the 14th, 15th and 16th days of December, 1919, on the coast of Japan? If so, what is the amount?

11. What, if any, proceedings have been taken to adjust the amount that the owners of the cargo of the "Deuel" and the owners of the said "Deuel" should pay to the owners of the "West Inskip," and her officers and crew for the salvage services rendered to said "Deuel" and her cargo by the said [10] "West Inskip" and her officers and crew on the 14th, 15th and 16th days of December, 1919.

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed May 11, 1920. W. B. Maling, clerk. By T. L. Baldwin, Deputy Clerk. [11]

Exhibit "A."

(RETURN REGISTRY RECEIPT FROM THE ATTORNEY GENERAL ATTACHED HERETO.)

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

(Affidavit of Service of Copy of Libel and of Mailing the Same by Registered Letter to the Attorney General of the United States, at Washington, D. C.)

H. W. Hutton, being first duly sworn, deposes and says as follows:

On the 11th day of May, 1920, immediately after the filing of the libel in the above cause with the clerk of said court, I served a copy of the said libel on the United States Attorney for the Northern District of California, by delivering and leaving a copy thereof at her office, and immediately thereafter enclosed a copy of said libel in an envelope addressed to the Attorney General of the United States, Washington, District of Columbia, and having prepaid the postage and registering fees thereon

I delivered the same to the Registry Clerk at the United States postoffice in the city and county of San Francisco, State of California, and requesting a return receipt for such package, I in due course received the same through the United States mails, the said receipt being attached hereto [12] and marked Exhibit "A."

H. W. HUTTON.

Subscribed and sworn to before me this 25th day of May, 1920.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed May 25, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Answer.

To the Honorable M. T. DOOLING, Judge of the Southern Division of the United States District Court for the Northern District of California.

Comes now the United States of America, defendant above named, represented herein by Frank M. Silva, United States Attorney in and for the Northern District of California, by and through E. M. Leonard, Assistant United States Attorney, and for answer to the libel on file herein, denies, admits and alleges as follows:

I.

Answering unto the allegations of Article 4 of said libel, denies that when the said vessel "Deuel" was sighted by said vessel "West Inskip," that said "Deuel" was in a dangerous and perilous condition with a large and valuable cargo on board, and all or any part of which was in great or any danger of total loss and in this behalf alleges that at no time was the said "Deuel" in danger of total or any great loss, that she was a short distance offshore, that the agent of the insurer of said vessel was board her [14] after she ran aground, and before any material assistance was rendered by said "West Inskip," with the stevedores, barges and tugs, and that the entire salving of said vessel was in the hands and under the control, and accomplished under the supervision of said agent of said insurer, and that said vessel was rescued mainly with the assistance of said barges, stevedores brought aboard and furnished by said agent.

II.

Answering unto the allegations of Article 5 of said libel, alleges that no salvage has been paid for salving the said cargo of "Deuel," but a tentative agreement has been made to settle the claim of the "West Inskip" and of her crew in the sum of $45,000.00, of which $40,000.00 is to be applied for services of the "West Inskip" and $5,000.00 for her crew.

III.

Answering unto the allegations of Article 6 of said libel, denies that the sum of $1,000.00 to each of said libelants would be a reasonable award to be made for such services as may have been rendered by them, and denies that they are entitled to any reward other or additional to that already offered to them as hereinafter set forth.

IV.

Answering unto allegations of Article 7 of said libel, denies that all and or singular premises of said libel are true, but admits that the same are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court; alleges that an offer of settlement has been made to said libelants on the basis of $5,000.00 to be apportioned among the members of said crew as follows:

First. $600.00 to the master of said vessel and [15] $50.00 extra to members of the crew who boarded said vessel "Deuel" and assisted in jettison work and balance of said $5,000.00 to be apportioned according to salaries earned by members of said crew.

WHEREFORE defendant prays that libelants be awarded nothing more than sums offered as above

alleged; that defendant recover its costs and charges herein occurred and such other and further relief as may be just.

Dated this 26th day of August, 1920.

FRANK M. SILVA,
United States Attorney,
E. M. LEONARD,
Asst. United States Attorney,
Proctors for Defendant. [16]

Interrogatories Propounded to Libelants.

I.

What are the names of the libelants who went aboard the steam vessel "Deuel" about December 14th and 15th, 1919?

II.

For what period of time was each of said libelants aboard said steam vessel "Deuel" and on what date?

III.

Did any of libelants receive overtime pay for services rendered while salvage of the "Deuel" was being made? If so, for what period of time and in what amount?

FRANK M. SILVA,
United States Attorney,
E. M. LEONARD,
Asst. United States Attorney,
Proctors for Libelee. [17]

Answers to Interrogatories (Propounded to Respondent).

1. United States of America was the owner of the "Deuel" between the 13th and 17th days of December, 1919.

2. The cargo of the "Deuel" was owned by about 32 different consignees as follows:

Order Japan Cotton Trading Co. of Texas notify Nippon Menkwa Kabushiki Kaisha, Kobe.

Order Southern Products Co., notify Mitsui Bussan Kaisha, Ltd., Kobe.

J. Witkowski & Co., notify M. Takase, Fusan, Korea.

J. Witkowski & Co., notify G. Konishi, Kobe.

J. Witkowski & Co., notify Seishin Shoko, Dairen, Manchuria.

J. Witkowski & Co., notify Kawano Honten, Chemulpo, Korea.

Order Rogers, Brown & Co., notify Cho Ito & Co., Kobe.

Order Northwest Trading Co., Ltd., notify Iwasaki Mercantile Co., Kobe.

Northwest Trading Co., Ltd., notify Northwest Trading Co., Ltd., Kobe.

Order United States Steel Products Co., A/C Takata & Co., notify Takata & Co., Kobe.

Order Taiyo Shoko Kaisha, Ltd., notify Taiyo Shoko Kaisha, Ltd., Kobe.

Order Mutual Products Trading Co., notify Sogo Boeki Shokai, Osaka, Japan.

Order T. Takiguchi Co., notify C. T. Takahashi, Osaka.

Order Rogers Brown & Co., notify Konoshita Trading Co., Ltd., Kobe.

Order Mitsui & Co., Ltd., notify Mitsui Bussan Kaisha, Fusan, Korea.

Order Japan Cotton Trading Co., notify Nippon Menkwa Kabushiki Kaisha, Kobe.

Order United States Steel Products Co., A/C Mitsui Bussan Kaisha, Ltd., notify Mitsui Bussan Kaisha, Ltd., Kobe.

Order United States Steel Products Co., A/C Iwai & Co., Ltd., notify Iwai & Co., Ltd., Osaka. [18]

Order C. Itch & Co., Ltd., notify C. Itoh & Co., Ltd., Kobe.

Order Mitsui & Co., Ltd., notify Mitsui Bussan Kaisha Ltd., Nagasaki.

Order International Lumber Export Co., Inc., notify S. Awaya & Co., Osaka.

Order International Lumber Export Co., Inc., notify Hayama Shoten, Kobe.

Order Mitsui & Co., Ltd., notify Mitsui Bussan Kaisha Ltd., Dairen, Manchuria.

Order Southern Products Co., notify Mitsui Bussan Kaisha, Ltd., Yokohama.

Order Japan Cotton Trading Co., of Texas notify Nippon Menkwa Kabushiki Kaisha, Yokohama.

Order United States Steel Products Co., A/C Takata & Co., notify Takata & Co., Tokio.

Order Mitsui & Co., Ltd., notify Mitsui Bussan Kaisha, Ltd., Yokohama.

Order United States Steel Products Co., A/C Mistui Bussan Kaisha, Ltd., notify Mitsui Bussan Kaisha, Ltd., Yokohama.

Order Mutal Products Trading Co., notify S. Kato & Co., Yokohama.

Order S. Kawano, notify N. Uchida & Co., Tokio.

Order Takeichi Co., notify S. Ban Co., Tokio.

Order Mitsui & Co., Ltd., notify Mitsui Bussan Kaisha, Ltd., Kobe.

3. It costs about $60,000.00 to repair the said "Deuel."

4. Her value was about $1,250,000.00 in sound condition.

5. According to available records all jettisoned cargo of "Deuel" was recovered undamaged.

6. The value of salvaged cargo was about $1,500,000.00.

7. General average bonds were signed by the consignees and security for payment of general average and salvage was taken either as cash or deposit from the consignees or a guarantee of underwriters.

8. No salvage has been paid by the salvaged cargo.

9. Same as answer to eight.

10. Attempt to adjust the amount that the "Deuel" should pay [19] the owners of "West Inskip" has been made by the insurance division of the Emergency Fleet Corporation by tentative agreement to settle claim of "West Inskip" and her crew in the sum of $45,000.00 of which $40,000.00 is to be applied to the services of the ship "West Inskip" and $5,000.00 to be apportioned to her crew. The leading cargo underwriters have agreed to this amount.

11. Same as ten.

FRANK M. SILVA,
United States Attorney,
E. M. LEONARD,
Asst. United States Attorney,
Proctors for Defendant.

[Endorsed]: Filed Aug. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

UNITED STATES OF AMERICA,

Defendant.

Answers to Interrogatories Attached to Answer.

United States of America,
Northern District of California,—ss.

In answer to the interrogatories attached to defendant's answer, the proctor for the libelants states that he makes the answer on behalf of the libelants for the reason that on account of the long time it took defendant to answer in this case, libelants became scattered throughout the world, and it is impossible for him to now reach them.

In answer to the first interrogatory he states:

That the names of the libelants who went on board of the "Deuel," and assisted in moving her cargo are: J. W. Jacomssen, C. Carlson, John Anderson, T. Nilson, K. K. Pollard, E. C. Hansen and Evert Seppa.

In answer to the second interrogatory, he states: That they went on board of the "Deuel," at 1 P. M. December 15th, 1919, and stayed on board until the hour of 9:15 of said day.

In answer to Interrogatory Number III, he states, that he is [21] unable to answer said interrogatory, but states that the matter inquired of in said interrogatory must be within the knowledge of defendant as it must know whether it paid overtime for the work inquired of or whether it did not.

H. W. HUTTON.

Sworn to before me this 10th day of September, 1920.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Copy received this 10th day of September, 1920.

FRANK M. SILVA,
Attorney for Defendant.

Filed Sep. 10, 1920. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clrek. [22]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Friday. the fifth day of November, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable M. T. DOOLING, Judge.

No. 16,853.

OTIS E. MILES et al.

vs.

UNITED STATES OF AMERICA.

Minutes of Court—November 5, 1920—Hearing.

This cause came on regularly this day for hearing of the issues joined herein. H. W. Hutton, Esq., was present as proctor for libelant. E. M. Leonard, Esq., Asst. U. S. Atty., was present as proctor on behalf of respondent. Mr. Hutton introduced in evidence copy of log, which was filed and marked Libelants' Exhibit No. 1. After hearing the respective proctors herein, the Court ordered that said matter be submitted on briefs to be filed in 10, 10 and 5 days. [23]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

Before Hon. M. T. DOOLING, Judge.

OTIS E. MILES et al.,

Libelants,

vs.

UNITED STATES OF AMERICA,

Respondent.

Transcript of Proceedings at Hearing.

Friday, November 5, 1920.

COUNSEL APPEARING:

For the Libelants: H. W. HUTTON, Esq.

For the United States: E. M. LEONARD, Esq., Assistant U. S. Attorney.

Mr. HUTTON.—This is also a salvage case, if your Honor please, and we have practically agreed on all of the facts in the case. The facts of the case, if your Honor please, are these: The "Deuel," a new steamer, with a cargo of the value, which is agreed to, of $1,500,000, went on shore just out of Yokohama. Now, there were some interrogatories attached to the libel, asking for the value of the cargo, which is said to be $1,500,000, which we are satisfied with; also, as to the value of the vessel, the answer to the interrogatory is $1,250,000; that was a typographical error, I believe, Mr. Leonard. I believe it is agreed that the value of the vessel was $1,762,000.

The COURT.—$1,762,000? [24]

Mr. HUTTON.—Yes.

Mr. LEONARD.—$1,760,000; the insurance on the vessel, I understand, is $1,760,000, on each of the vessels, are "West Inskip" and the "Deuel."

Mr. HUTTON.—$1,760,000, which makes a value of $3,260,000. She went on shore on a dangerous reef, and it is conceded practically in the report of the master, the copy of the log-book that I will offer in evidence, that both vessels were in danger, and there is no question about it; that considerable skill was used by the master of the "West Inskip" in towing the "Deuel" off the rocks, the winds were bad and likely to be bad, and she was close in, and the sea kept up, and there was considerable danger. You have no objection to this, have you, Mr. Leonard?

Mr. LEONARD.—No, none, whatever.

Mr. HUTTON.—I will offer in evidence a copy of the log of the "West Inskip." It practically shows all the conditions. Now, I call your Honor's attention to this part of it: "In conclusion, it may be said the bottom where the 'Deuel' stranded is rocky and uneven, and is much broken up all around. The nearest land above water was fully one and one-quarter miles off. The position was fraught with danger, in so much that a westerly wind (the prevailing winds at this season) would have materially lessened the 'Deuel's' chances. Moderate and fine weather prevailed. A steam salvage schooner arrived on the 15th and was most anxious to render assistance, which, however, was not accepted. The refloating of the 'Deuel' in such quick time is mainly

due to the masterly way in which Captain Tibbetts, of the 'West Inskip' placed his ship in position, and then rendered very efficient service." [25]

It is agreed, if your Honor please, between us that the wages of the officers and crew of the "West Inskip" were $5,370, of which the master's wages were $357.50, and the supercargo's wages were $175 a month.

Seven men of the "West Inskip" went from her over on to the "Deuel" and assisted in throwing overboard considerable of her cargo, which was subsequently saved, it being lumber, and the Shipping Board, and Mr. Leonard, and myself have all thought that these men are entitled to additional compensation to what your Honor should think the others would be entitled to, and we have practically always understood and agreed that $50 additional to those men could be a reasonable allowance.

Mr. LEONARD.—I will state to the Court there were negotiations, and that would have been the basis of the compromise that was offered by the Shipping Board, although I don't know how far that will be conclusive upon the Court; I think the Court will act on its own judgment as to what award should be made.

Mr. HUTTON.—There have been no depositions taken in the case, because the facts are very clarly set forth; the values are all agreed upon, and there is no dispute, practically, in the pleadings about the services, and I suppose it would be better to submit the case on briefs.

Mr. LEONARD.—Yes.

[Endorsed]: Filed May 11, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [26]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

UNITED STATES OF AMERICA,

Respondent.

(Opinion and Order to Enter a Decree Awarding to Each Libelant an Amount Equal to Two Months' Pay.)

H. W. HUTTON, Esq., Proctor for Libelants.

FRANK M. SILVA, Esq., United States Attorney, and E. M. LEONARD, Esq., Assistant United States Attorney, Attorneys for Respondents.

It is admitted that libelants are entitled to some award for salvage, the only question being as to the amount. Considering all the circumstances, I think an award equal to two months' pay to each libelant will be fair. A decree will be entered accordingly.

February 18th, 1921.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Feb. 18, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

UNITED STATES OF AMERICA,

Defendant.

(Decree.)

This cause having been heard upon the pleadings and proofs and the arguments and briefs of the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now, therefore, by reason of the matters set forth in the pleadings and shown by the proofs herein, it is ORDERED, ADJUDGED AND DECREED, that libelants have and recover from the defendant The United States of America, and defendant The United States of America pay to the libelants or to H. W. Hutton, their proctor for them, for salvage services rendered by libelants to the steam vessel "Deuel" and her cargo, the following amounts respectively, the same being in amount two months' wages to each libelant, to wit:

To Otis E. Miles, the sum of one hundred and eighty ($180.00) dollars.

To E. M. La Casa, the sum of one hundred and eighty ($180.00) dollars.

To John Nelson, the sum of one hundred and eighty ($180.00) dollars. [28]

To T. M. Thompson, the sum of one hundred and eighty ($180.00) dollars.

To Manuel Fernandez, the sum of one hundred and eighty ($180.00) dollars.

To A. Rodrigues, the sum of one hundred and eighty ($180.00) dollars.

To Mark Kobs, the sum of one hundred and eighty ($180.00) dollars.

To R. Rodd, the sum of one hundred and eighty ($180.00) dollars.

To G. H. Marsh, the sum of one hundred and eighty ($180.00) dollars.

To A. F. Awort, the sum of two hundred and ten ($210.00) dollars.

To C. Carlson, the sum of one hundred and eighty ($180.00) dollars.

To T. Nilson, the sum of one hundred and eighty ($180.00) dollars.

To James McLennon, the sum of one hundred and eighty ($180.00) dollars.

To Evert Seppa, the sum of one hundred and eighty ($180.00) dollars.

To Fred. Taucher, the sum of one hundred and eighty ($180.00) dollars.

To John Anderson, the sum of one hundred and eighty ($180.00) dollars.

To J. M. Jakobssen, the sum of one hundred and eighty ($180.00) dollars.

To E. C. Hansen, the sum of one hundred and eighty ($180.00) dollars.

To O. Lund, the sum of one hundred and eighty ($180.00) dollars. [29]

To J. E. Norman, the sum of two hundred and ten ($210.00) dollars; and

To E. K. Pollard, the sum of one hundred and thirty ($130.00) dollars,

—all libelants herein as aforesaid, and all with their costs to be taxed, and interest from the date of this decree.

It is further ORDERED, ADJUDGED AND DECREED, that upon making payment of the above amounts to said H. W. Hutton, proctor for said libelants, this judgment and decree be adjudged to have been satisfied and paid to the libelants above mentioned.

Dated March 1st, 1921.

M. T. DOOLING,
District Judge.

[Endorsed]: Copy received this 21st day of February, 1921.

FRANK M. SILVA,
Proctor for Defendant.

Entered in Vol. 10, Judg. and Decrees, at page 321.

Filed Mar. 1, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [30]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,
Libelants,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Notice of Appeal.

To the Libelants Above Named and to H. W. Hutton, Esq., Their Proctor:

You and each of you are hereby notified that the United States of America, respondent above named, intends to and hereby does appeal from the decision and final decree made and entered in the above-entitled court and cause on the 1st day of March, 1921, to the United States Circuit Court of Appeals for the Ninth Circuit, and, in accordance with the practice and procedure in admiralty, intends to and will make application for leave of the Honorable United States Circuit Court of Appeals for the

Ninth Judicial Circuit to take new proofs before said court in support of the allegations and facts set forth and contained in the several paragraphs of the said respondent's answer filed in said suit.

Dated at San Francisco, California, this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondent.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [31]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,
Libelants,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Appeal.

The above-named respondent, the United States of America, conceiving itself aggrieved by the final decree made and entered in the above-entitled cause on the 1st day of March, 1921, wherein and whereby it was ORDERED, ADJUDGED AND DECREED that the libelants above named have and recover against the said United States of America two months' pay to each of said libelants for salvage services rendered by them to the SS. "Deuel," together with costs and interest from the date of said judgment, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said decree, for the reasons set forth in the assignment of errors filed herewith, and said respondent prays that its petition herein for its said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [32]

Dated at San Francisco, California, this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney.
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondent United States of America,

Order Allowing Appeal.

Upon the foregoing petition of the United States

of America, respondent above named, praying for the allowance of an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, it appearing to the Court that said respondent has duly filed its assignment of errors as required by law and the rules of said United States Circuit Court of Appeals for the Ninth Circuit; now, therefore,

IT IS HEREBY ORDERED that the said appeal be, and the same is hereby, allowed as prayed for.

Dated at San Francisco, California, this 14th day of April, 1921.

W. H. HUNT,
Judge of said United States Circuit Court.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [33]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W.

JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,
Libelants,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Assignment of Errors.

NOW COMES the United States of America, respondent above named, and says:

That in the record and proceedings in the above-entitled cause there is manifest error and said respondent now makes, files and presents the following assignment of errors upon which it will rely upon the appeal of said cause to the Circuit Court of Appeals for the Ninth Judicial Circuit, as follows, to wit:

1. The Court erred in awarding to the said libelants or to any of them any amount whatsoever for alleged salvage services rendered to the SS. "Deuel."

2. The Court erred in awarding to the said libelants and to each of them two months' pay for salvage services alleged to have been rendered by them to the said SS. "Deuel," and in awarding to said libelants and to each of them any amount in excess of one month's pay to each of them as compensation for said alleged salvage services.

3. The Court erred in failing to render a decision and [34] order judgment entered in favor of the said respondent, the United States of America, dismissing the libel of said libelants filed in said cause.

4. The Court erred in awarding to the said libelants and to each of them any amount whatsoever, for the reason that said libelants were at the time of the alleged salvage services members of the crew of a vessel belonging to the United States of America, and rendered salvage services, if any, to a vessel likewise belonging to the said United States of America, and by reason thereof it became the duty of the said libelants and each of them to render said services without compensation beyond their wages as seamen on said United States vessel.

Dated at San Francisco, California, this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney.
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondent.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [35]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,

Libelants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Supersedeas.

The United States of America, respondent above named, having duly given notice of appeal from the decision and final decree in the above-entitled cause entered on the 1st day of March, 1921, and having duly filed its assignment of errors upon said appeal,—

IT IS HEREBY ORDERED that said decision and decree be and the same is hereby superseded and all proceedings thereunder stayed.

April 14, 1921.

W. H. HUNT,

Judge of the United States Circuit Court.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [36]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES et al.,

Libelants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Stipulation (and Order to Transmit Original Exhibit).

It is hereby stipulated by and between the parties above named that upon the appeal of the above-named respondent in the above-entitled cause, there may be transmitted to the clerk of the Circuit Court of Appeals for the Ninth Circuit all the exhibits filed in said cause in their original form.

Dated, this 15th day of Aril, 1921.

H. W. HUTTON,
Proctor for Libelants,
FRANK M. SILVA,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant United States Attorney, in Admiralty.

It is so ordered.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: Filed Apr. 18, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [37]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 37 pages, numbered from 1 to 37, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Otis E. Miles et al., Libelants, vs. United States of America, Respondent, No. 16,853, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the proctor for respondent and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Twelve Dollars and Fifty-five Cents ($12.55), and that the same will be charged against the United States, in my next quarterly account.

Annexed hereto is the original citation on appeal, issued herein (page 39).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 13th day of May, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [38]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,853.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD, and O. LUND,
Libelants,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Citation.

United States of America,
Northern District of California,—ss.

The President of the United States of America, to the Libelants Above Named, GREETING:

You and each of you are cited and admonished

to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the Southern Division of the District Court of the United States in and for the Northern District of California, in the above-entitled proceeding, wherein the above-named United States of America is respondent and you are the respective libelants, to show cause, if any there be, why the decree entered in the above-entitled proceeding on the 1st day of March, 1921, in said appeal mentioned, and thereby appealed from, should not be corrected and reversed, and speedy justice should not be done to the parties in that [39] behalf.

WITNESS the Honorable W. H. HUNT, Judge of the District Court in and for the Southern Division of the District Court of the United States in and for the Northern District of California, at the city of San Francisco, State of California, this 14th day of April, 1921.

W. H. HUNT,
United States Circuit Judge.

Service of a copy of the within citation, and of notice of appeal, petition on appeal, order allowing appeal, assignment of errors, and order of supersedeas, in the above-entitled cause, are hereby admitted this 14th day of April, 1921.

H. W. HUTTON,
Proctor for Libelants. [40]

[Endorsed]: No. 16,853. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. In Admiralty. Otis E. Miles et al., Libelants, vs. The United States of America, Respondent. Citation. Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [41]

[Endorsed]: No. 3686. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Otis E. Miles, E. M. La Casa, John Nelson, T. M. Thompson, Manuel Fernandez, J. Rodrigues, A. F. Awort, Mark Kobz, R. Redd, G. H. Marsh, C. Carlson, T. Nilsen, James McLennan, Evert Seppa, Fred Taucher, John Anderson, J. W. Jakobssen, E. C. Hansen, J. B. Norman, K. K. Pollard, and O. Lund, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Libelants' Exhibit No. 1.

Copy.

RECORD OF AMERICAN AND FOREIGN SHIPPING "AMERICAN LLOYDS."
AMERICAN BUREAU OF SHIPPING.
66 Beaver St., New York.

Yokohama, 19th December, 1919.

This is to certify that a refloating survey was held on S. S. "DEUEL" of 3645 tons off the port of Misaki, Lat: 35–10 North. Long: 139–35 East.

THE UNDERSIGNED proceeded by motor car to Misaki, took boat, arrived on board the S. S. "DEUEL" at 8 A. M. 15th instant and found: The S. S. "DEUEL" from Seattle, laden with general cargo under hatches and deckload of square logs lumber on deck fore and aft, destined to Yokohama. When making the entrance to Tokio Gulf she STRANDED, 14th inst. at 9:05 A. M. the time of high water with falling neap tides. The S. S. "WAWALONA" anchored in safe position and standing by to render assistance. The S. S. WEST INSKIP" in a very favorable position to render assistance—l. e. both anchors down and three tow lines (1–5" steel wire, 2–8" man: Hawsers) attached to the S. S. "DEUEL" and stern to stern. On the 15th inst., from 8:30 to 10:50 A. M. an united effort was made to refloat but there was no movement of the "DEUEL." It was reported the Fore Peak leaking and the fuel oil (said to be 800 bbls) kept therein had leaked and that the remaining fuel oil in this compartment was damaged by sea water contact.

Soundings in all other parts of the ship showed no change. Rise and fall of tide 4 feet. Soundings taken all round the ship at noon 15th inst. gave:

During the day the most favorable disposition was made of all movable oil fuel and water ballast. The ship's crew assisted by the crew of the "WEST INSKIP" handled the deck cargo of square logs, shifting some to the after main deck and throwing other overboard and this was continued through raining weather until about 10:30 P. M.

A wireless was sent to Yokohama for cargo lighters to carry 300 tons and for 40 stevedore men. A steamtug (previously ordered) arrived but was too small to be effect*ed*—the steamtug was sent back to hurry up the lighters and men. This P. M. (15*g*h inst) the "Wawalona" left: the service of standing by only had been rendered, no rope was passed from ship to ship. The P. M. tide (15th inst:) serving badly no effort was made to refloat. Arrangements were made by the Company's Agent with the local Officials for the fishermen to salve the jettisoned logs lumber.

Copy.

AREOGRAMS.

CAPT. TIBBETSS—ALL LINES NOW SECURED WILL YOU PLEASE GIVE TWO BLASTS OF YOUR WHISTLE WHEN YOU WANT TO GO FULL SPEED ASTERN WITH OUR ENGINES IN CASE OF NO HEADWAY AND YOU THINK IT BEST TO GIVE IT A TRY IN THE MORNING PLEASE GIVE ME ONE

BLAST ON YOUR WHISTLE, TONIGHT HIGH TIDE AT 9:56 P. M. WILL HAVE CREW STAND BY AT 9:30 P. M. WAWALONA GOING TO STAND BY TILL MORNING IN CASE IT IS NECESSARY TO HAVE ANOTHER TRIAL.

(Signed) W. N. REED, Commander.

Received 6 P. M. December 14, 1919.

WE HAVE NO MORE WIRE LEFT, ONLY ABOUT 10 FATHOMS LEFT TO MAKE FAST HERE AND THAT IT WOULD BE BETTER IF YOU COULD BACK UP A LITTLE WAYS.

(Signed) REED, Commander.

Received 9:15 A. M. December 15, 1919.

TO CAPT. TIBBETTS—WEST INSKIP. YOUR MESSAGES RECEIVED, IF POSSIBLE PLEASE START PULLING AT TEN O'CLOCK OR A LITTLE LATER, UNTIL 12:30, P. M. IF IMPOSSIBLE, THEN WILL HAVE TO MAKE ARRANGEMENTS WITH SALVAGE COMPANY. WILL THROW OFF TIMBERS IN MEAN WHILE. BELIEVE SHE HAS LOOSENED CONSIDERABLY.

(Signed) REED, Commander.

S. V. C. #1—Received 9:15 *S.* M. December 16, 1919.

TO CAPT. TIBBETTS—STR. WEST INSKIP. CAPTAIN REED WISHES CAPTAIN TIBBETTS A PLEASANT VOYAGE AND IS DEEPLY GRATEFUL FOR SERVICES OF WEST INSKIP, MANY THANKS TO ALL ON BEHALF OF STEAMER DEUEL.

(Signed) REED, Commander.

S. V. C. #2—Received 11:50 A. M. December 16, 1919.

16th Dec. commences with all hands and the 40 stevedore men jettisoning desk cargo. The After Peak (said to contain 200 bbls. fuel oil, had previously been filled with sea water to help tip the ship) was pumped out. At 10:30 A. M. an united effort was made and at 11:20 A. M. the S. S. "DEUEL" refloated having been towed off by the S. S. "WEST INSKIP" and into deep water, also assisted by the S. S. "DEUEL" going a good full speed astern all the time the effort was being made and up to the time of refloating. Draft when refloated F. 19–6″ A. 25′–0″. The "WEST INSKIP" proceeded on her voyage. The S. S. "DEUEL" proceeded for Yokohama where she arrived, passed medical examination, and made fast to Buoy in inner harbo*ut* at 4:30 P. M. 16th instant.

The number of Logs jettisoned when stranded off Misaki is 143 (one hundred & forty three) 92 destined to Yokohama. 51 destined to Dairen. All cargo under hatches remained untouched, and as the Bilge soundings throughout remained unaltered it is fair to assume there is no damage to cargo under hatches as a result of the stranding.

Stores or Damage.	Attributed to.
Fore Peak fuel oil all lost	Due to stranding.
After Peak fuel oil all lost	On behalf of all concerned.
Two bridge deck ladders leading to main deck	Due to jettison of cargo.
143 Logs Lumber jettisoned	On behalf of all concerned.
One coil Man: Rope 2¾″)	Use for jettisoned
One half coil Man: Rope 2″)	lumber to help secure
One half coil Man: Ratline 12thd)	a raft.

In conclusion it may be said the bottom where the "DEUEL" stranded is rocky and uneven and is much broken up all around. The nearest land above water was fully 1¼ miles off. The position was fraught with danger insomuch that a Westerly wind (the prevailing winds at this season) would have materially lessened the "DEUEL'S" chances. Moderate and fine weather prevailed. A steam salvage schooner arrived on the 15th inst: and was most anxious to render assistance, which, however, was not accepted. The refloating of the "DEUEL" in such quick time is mainly due to the masterly way in which Captain Tibbetts of the "West Inskip" placed his ship in position and then rendered very efficient service.

The undersigned has transmitted to the "Record" the original of this report which simply deals with the refloating of the S. S. "DEUEL" and the charge is made for attending on board (two full days), advising Master, assisting to refloat, taking steamer to Yokohama, and reporting on refloating of Six hundred yen.

Fee 600 Yen.

(Signed) RENNIE TIPPLE.

RENNIE TIPPLE, A. I. N. A.

Surveyor to American Bureau of Shipping.

Copy.

CONSULATE OF THE UNITED STATES OF AMERICA.

PORT OF KOBE, JAPAN, to wti:

BY THIS PUBLIC INSTRUMENT OF DECLARATION AND PROTEST. Be it known and

made manifest unto all to whom these presents shall come or may concern, that on the 30th day of December, one thousand nine hundred and nineteen, before me E. H. Dooman, Consul of the United States of America for Kobe, Japan, and the dependencies thereof, personally came and appeared William Reed, Master of the ship or vessel called the Deuel, of Seattle, of the burden of 4365 tons, or thereabouts, then lying in this port of Kobe, laden with general cargo, who duly noted and entered with me, the said Consul, his Protest for the uses and purposes hereafter mentioned; and now, on this day, to wit, the day of the hereof, before me the said Consul, again comes the said William Reed, and requires me to extend this Protest; and together with the said William Reed also came Lars Eriksen, mate, Charles Triplett, carpenter, Fred Leyman and Kenneth Paterson, seamen, of and belonging to the said ship, all of whom being by me duly sworn on the Holy Evangelists of Almighty God, did severally voluntarily freely and solemnly declare, depose and state as follows, that is to say: That these appearers, on the 17th day of November, in their capacities aforesaid, sailed in and with the said ship from the port of Seattle, laden with general cargo, and bound to the port of Dairen; that the said ship was then tight, staunch, and strong; had her cargo well and sufficiently manned, victualled, and furnished with all things needful and necessary for a vessel in the merchant service, and particularly for the voyage she was about to undertake; that after a stormy and tempestuous passage of twenty-four days, the

compasses were found to be defective; that due to this fact and to the fact that the current at this spot was flowing in a direction opposite to that shown on the charts, the vessel grounded on December 14th, at Kamigo Reef at the entrance of the Gulf of Tokyo at about 9:09 A. M., that a message of distress was immediately despatched to the vessel's agents at Yokohama and endeavors were made, with the assistance of the steamship "West Inskip," to get afloat, but with no success; that Lloyds' Surveyor, who had proceeded to the vessel, then instructed that the cargo on the deck be jettisoned to lighten the vessel, and upon so doing and after the "West Inskip" had been pulling for two hours the vessel slid off ground at 11:20 A. M. on December 16th; that upon arrival in Yokohama, the vessel was drydocked for temporary repairs to allow the vessel to proceed to Kobe, where she arrived on December 27th, for extensive repairs; and that further, the following articles were lost or spoiled by sea water in the after peak.

100 lbs Rice
500 lbs Cane Sugar
200 lbs Brown Sugar
75 lbs Spaghetti
100 lbs Soda crackers
75 lbs Assorted cookies
75 lbs Dried apples
25 lbs Cornstarch
10 lbs Garlic
25 lbs Barley
100 lbs Dairy salt
50 lbs Coffee
50 lbs Split peas
25 lbs Macaroni
25 lbs Tea
10 lbs pipe Berths and mattresses

And these said Appearers, upon their oaths aforesaid, do further declare and says: That during the

said voyage they, together with the others of the said ship's company used their utmost endeavors to preserve the said steamer and cargo from all manner of loss, damage, or injury. Wherefore the said William Reed, Master, hath Protested, as by these presents I, the said Consul, at his special instance and request, do publicly and solemnly Protest, against all and every person and persons whom it doth or may concern, and against the winds, and waves, and billows of the seas, and against all and every accident, matter and thing, had and met with as aforesaid, whereby and by reason whereof, the said steamer or cargo already has, or hereafter shall appear to have suffered or sustained damage or injury. And do declare that all losses, Damages, Costs, Charges, and Expenses that have happened to the said steamer or cargo, or to either are, and ought to be borne by these to whom the same by right may appertain by *wasy* of average or otherwise, the same having occurred as before mentioned, and not by or through the insufficiency of the said steamer, her tackle or apparel, or default or neglect of this appearer, his officers or any of his mariners.

This done and protested in the port of Kobe, this 30th day of December, in the year of our Lord one thousand nine hundred and ninteen.

IN TESTIMONY WHEREOF, These Appearers have hereunto subscribed their names, and I, the said Consul, have granted to the said Master this Public Instrument, under my hand and the seal of this Consulate, to serve and avail him and all others whom

it doth or may concern, as need and occasion may require.

Signed: EUGENE H. DOOMAN,
U. S. Consul.

Signed: WILLIAM REED, Master.
LARS ERIKSON, Mate.
CHARLES TRIPLETT, Carpenter.
FRED LEYMAN, Seaman.
KENNETH PATERSON, Seaman.

Empire of Japan,
Port of Kobe,—ss:

I, the undersigned, Consul of the United States of America, do hereby certify the foregoing to be a true and faithful copy of the original record preserved in the archives of this Office.

Given under my hand and official seal this 30th day of December, 1919.

(Seal) (Signed) EUGENE H. DOOMAN,
Consul of the United States of America.

Service No. 3036.

Copy.

DIVISION OF OPERATIONS.
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.
SAN FRANCISCO, CALIF.
S. S. "WEST INSKIP."

TO WHOM IT MAY CONCERN:

The following is a copy of the Abstract of Log of the S. S. "WEST INSKIP" from 2:45 P. M., December 14, 1919, to 11:40 A. M., December 16, 1919, covering the period this vessel was rendering assist-

ance to the S. S. "DEUEL" while that vessel was aground on Kamegi Reef.

ABSTRACT.

DECEMBER 14, 1919.

2:45 P. M.	Altered course to 330 degrees true, to assistance of S. S. "DEUEL."
3:48 P. M.	Slow ahead.
3:49 P. M.	Stop. Lowered boat and took soundings.
4:04 P. M.	Slow ahead.
4:06 P. M.	Stop.
4:10 P. M.	Half astern.
4:11 P. M.	Stop.
4:14 P. M.	Slow ahead.
4:16 P. M.	Slow astern. Let go starboard anchor.
4:18 P. M.	Slow ahead.
4:19 P. M.	Full astern.
4:20 P. M.	Full ahead.
4:22 P. M.	Full astern.
4:23 P. M.	Slow ahead.
4:24 P. M.	Half ahead.
4:25 P. M.	Slow ahead.
4:27 P. M.	Full astern.
4:28 P. M.	Slow ahead.
4:30 P. M.	Half astern.
4:31 P. M.	Slow astern.
4:32 P. M.	Stop.
6:00 P. M.	Two 8″ lines from stern made fast to the S. S. "DEUEL." Slow ahead.
9:15 P. M.	Full ahead—High water.
10:06 P. M.	Slow ahead.

10:15 P. M. Let go port anchor. 30 fathoms chain. Kept engines going slow ahead. Both anchors out.

DECEMBER 15, 1919.

9:35 A. M. Made fast wire hawser from stern of S. S. "DEUEL."

9:50 A. M. Full speed ahead, high water, attempting to float S. S. "DEUEL."

Coming out of Puget Sound and Westerly courses weather rain and foggy. I found nothing wrong with my compasses. Also on our trips across, which was very stormy and ship continually tossing about I found the compasses acting right till within a thousand miles off Japan Coast, I found a 4′ Easterly deviation by Azimuth, but the ship tossing about so bad I could not make sure. The day I cam clost to the coast I had a short glimpse of the sun and made out a Easterly deviation of 8′ on West South West course. I set my compass accordingly but found on making Innuboe Saki light and got same abean, that I was far East of calculations so I had my doubt about the 8′ deviation but still I used it in setting my courses to counteract the current on shore and found my ship about the distance off the headlands that I expected to be in. On swinging around Najuma Saki at 4:30 A. M. December 14th, 1919 and allowing for the current the way it showed on my chart I was set at the rate of three miles per hour nearly opposite the way the current showed on the charter also putting me ten miles ahead of my reckoning and about six miles to the Westward. When off as I supposed was to be Suna Sake and hauled

my ship on a North North East course magnetic, I found that instead of being abreast of Suno Saki I was up passed Tsurugi Saki which showed a red light flashing it seems to us on deck which must have been the red sector. I had bearings of Majima Saki and felt sure of my course, but as the weather was unfavorable with light patches of fog and current setting me at the rate of about three miles per hour Westerly instead of by chart it should have set us North North East about one mile. Consequences were that when I hauled on my North North East course for the Gulf of Tokio my course would not seem to take me clear of land ahead, thinking that my compass still had a large deviation Easterly I kept up to Northward and found myself aground after the ship had been stopped five minutes. Immediately after grounding a message was picked up by the S. S. WEST INSKIP who was leaving Yokohama bound for Kobe and came alongside offering assistance. At high tide December 14th, the above steamer endeavored to pull us off with the help of our own engines, and after trying continuously for one hour we ceased pulling for the night to await high tide the following day. At high tide on December 15th from 10 to 10:45 A. M. the S. S. WEST INSKIP with the help of our own engines kept pulling, but with no success. It was then decided by the Lloyds Surveyor ordered the balance of deckload forward and aft thrown overboard to lighten vessel as quickly as possible. The aforesaid mentioned steamer had been pulling on uf for about two hours and at 11:20 A. M. we slid off ground. Arrived inside Yokohama Harbor December 16th and made

fast to buoy at 4:41 P. M. Started discharging Yokohama cargo the following morning and finished same 12:10 P. M. December 19th. Divers were ordered to investigate ships bottom by surveyor which was done the morning of December 18th. Waited for report from divers till late the following day. It was then decided that the report made by the Japanese divers was very unsatisfactory and Lloyds Surveyor made arrangements with the Commander of the U. S. S. BROOKLYN to have his divers investigate. After investigation was made they reported as follows: One hole six feet by twelve feet or port side and one hole five feet by six feet also on port side forward, the first hole mentioned was reported under forepeak tank and *the to* be abaft the collision bulkhead. Lloyds Surveyor ordered the vessel to be drydocked and it was necessary to discharge cargo to lighten ships draft beforehand. Same was done and at 10 A. M. December 22nd with the assistance of Pilor and tugs we entered drydocked at 11:56 A. M. after dock was dry and on examination of ships bottom by Lloyds Surveyor, it was found there was only one hole under forepeak tank. It was decided to use a wood patch on above mentioned hole passed with heavy felt, and same being accomplished and inspected by Surveyor came off dock at 10:30 A. M. December 24th. At 1 P. M. same date started loading cargo that discharged to lighten ship Upon completion of same will proceed to Kobe.

WM. REED,
Master.

cc–LG. 1/30/20.

[Endorsed]: United States District Court. No. 16,853. Miles vs. U. S. Lib. Exhibit No 1. Filed Nov. 5, 1920. Walter B. Maling, Clerk. By Lyle P. Morris, Deputy.

No. 3686. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 13, 1921. F. D. Monckton, Clerk.

No. 3686

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD and O. LUND,
Appellees.

BRIEF OF APPELLANT
UNITED STATES OF AMERICA

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION IN ADMIRALTY.

JOHN T. WILLIAMS,
United States Attorney.

FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty.

Proctors for Appellant.

Neal, Stratford & Kerr, S. F. 16598

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

OTIS E. MILES, E. M. LA CASA, JOHN NELSON, T. M. THOMPSON, MANUEL FERNANDEZ, J. RODRIGUES, A. F. AWORT, MARK KOBZ, R. REDD, G. H. MARSH, C. CARLSON, T. NILSEN, JAMES McLENNAN, EVERT SEPPA, FRED TAUCHER, JOHN ANDERSON, J. W. JAKOBSSEN, E. C. HANSEN, J. B. NORMAN, K. K. POLLARD and O. LUND,
Appellees.

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION IN ADMIRALTY.

STATEMENT OF THE CASE.

Twenty-one members of the crew of the Steamship "West Inskip," consisting of three oilers, six

firemen, one deck engineer, one carpenter, nine sailors and one ordinary seaman, who had shipped on that vessel in November, 1919, on a voyage from the Pacific Coast to Asiatic ports and return, sued the United States on May 11, 1920, in the Southern Division of the United States District Court for the Northern District of California, First Division in Admiralty, for salvage services alleged to have been rendered to the S. S. "Deuel" about December 14, 1919, near the Port of Yokohama, Japan, where the "Deuel" had run aground. Both of the vessels were owned by the United States. (Tr., pp. 5-9.)

Neither the master nor any of the officers of the "West Inskip," and only a portion of her crew, are named as libelants in the suit.

At the time of the alleged salvage services the "Deuel" had a value of about One Million, Seven Hundred and Sixty-two Thousand Dollars (Tr., p. 24). Repairs to the "Deuel," consequent upon her grounding, cost about Sixty Thousand Dollars (Tr. p. 19).

The cargo aboard the "Deuel" at the time she grounded had a value of about One Million Five Hundred Thousand Dollars. All of this cargo was privately owned, and nothing has been collected by the United States for its salvage. (Tr. pp. 17-19.) An attempt, however, to adjust the amount that the "Deuel" should pay to the "West Inskip" has been made by the Insurance Division of the United States Shipping Board Emergency Fleet Corporation by

a tentative agreement to settle the claims of the "West Inskip" and her crew for Forty-five Thousand Dollars, of which Forty Thousand was to be applied to the services of the "West Inskip" and Five Thousand to be apportioned to her crew. The leading cargo underwriters agreed to those amounts. (Tr. p. 19.) The United States alleged in its answer that an offer of settlement had been made to the libelants on the basis of Five Thousand Dollars to be apportioned among the members of the crew of the "West Inskip" as follows: Six Hundred Dollars to the Master of that vessel, Fifty Dollars extra to the members of her crew who boarded the 'Deuel" and assisted in jettison work, and the balance of the Five Thousand Dollars to be apportioned according to the wages earned by the members of the crew. (Tr. p. 15.)

The District Judge awarded each of the libelants an amount equal to two months pay, or a total of Three Thousand Seven Hundred and Fifty Dollars. (Tr. p. 26.) The total monthly pay-roll of the "West Inskip," including the salaries of her master and officers, was Five Thousand Three Hundred and Seventy Dollars (Tr. p. 25), and consequently had the libel in this case been instituted by all of the officers and crew of the "West Inskip" instead of but by 21 of them, the total award, if made on the same basis, would have been in the neighborhood of Ten Thousand Seven Hundred and Forty Dollars. It is submitted that the award made, in view of the

services rendered as disclosed by the record, is excessive.

The S. S. "Deuel," laden with a general cargo, sailed from the Port of Seattle, Washington, bound to the Port of Dairen, on November 17, 1919. After a stormy passage of 24 days her compass was found to be defective, and due to this fact, and to the fact that upon the vessel swinging around Najuma Saki at 4:30 a. m., on December 14, 1919, the current was flowing in a direction opposite to that shown on the charts, the vessel at about 9:09 a. m. on December 14, 1919, grounded at Kamigo reef, at the entrance of the Gulf of Tokio. Immediately after the grounding the "West Inskip," then leaving Yokohama bound for Kobe, picked up a wireless message from the "Deuel" and came alongside the "Deuel" and offered assistance. (Tr. pp. 48, 53.) At high tide on December 14, 1919, the "West Inskip," with the help of the engines of the "Deuel," endeavored to pull the "Deuel" off, and after continuing the endeavor for *one hour* without any success, pulling ceased for the night. (Tr. p. 53.) At high tide on December 15, 1919, either from 10:00 a. m. to 10:45 a. m. (Tr. p. 53), or from 8:30 a. m. to 10:50 a. m. (Tr. p. 42), but probably commencing at about the first mentioned time (Tr. p. 52), another united effort was made to re-float the "Deuel," which was also unsuccessful. (Tr. pp. 42-53.)

A surveyor of the American Bureau of Shipping, who had gone aboard the "Deuel" at 8 a. m. on De-

cember 15, 1919, directed on that day the shifting of part of the deck cargo of square logs, and the throwing overboard of part of this cargo. This work was accomplished by the crew of the "Deuel" assisted by seven members of the crew of the "West Inskip" (Tr. pp. 25, 43), and continued until about 10:30 p. m. that day.

The following morning, December 15, 1919, the work of jettisoning the deck cargo was continued, with the additional assistance of forty stevedores who had been brought from Yokohama (Tr. pp. 43-45).

After the "Deuel" had thus been lightened under the direction of the surveyor, another effort was made to float her by the "West Inskip," aided by the engines of the "Deuel." This effort commenced at 10:30 a. m., December 16, 1919, and at 11:20 a. m., a little less than an hour later (Tr. p. 45), or at the most in about two hours (Tr. p. 53), the "Deuel" slid off ground. This apparently completed the salvage service of the "West Inskip." Most of the time after she first appeared on the scene, some time during the afternoon of December 14, 1919, she had been merely standing by. *The time she was actually engaged on pulling on the "Deuel" was less than five and a half hours.* The "West Inskip" altered her course to go to the assistance of the "Deuel" at 2:45 p. m., December 14, 1919 (Tr. p. 51), and she performed no service whatever, so far as the record shows, after 11:20 a. m. on December 16, 1919. Ac-

cording to the report of the Surveyor who directed the salvage operations (Tr. p. 46), the bottom where the "Deuel" stranded was rocky and uneven, and much broken up all around, and the nearest land was about one and one-fourth miles off. The position he said was fraught with danger, because a westerly wind, the prevailing wind at that season, would have materially lessened the "Deuel's" chances. Moderate and fine weather, however, prevailed at the time. The Surveyor also expressed the view that the refloating of the "Deuel" in such quick time was mainly due to the masterly way in which Captain Tibbetts, of the "West Inskip," placed his ship in position, and then rendered very efficient service. His modesty, perhaps, prevented any reference in his report to his own efforts in ordering and directing the shifting and jettisoning of the deck cargo, and his other efforts during December 15th and 16th, 1919, which undoubtedly contributed, to a very great extent, to getting the "Deuel" into deep water again, and for which services he contented himself with the moderate fee of 600 yen (Tr. p. 46).

For the salvaging of the privately owned cargo the libelants of course have no claim against the United States. So far as the salving of the "Deuel" is concerned, it is true that that vessel was in some danger, or would have been, had an unfavorable wind arisen. It does not appear that the "West Inskip" was in any danger at any time, nor was any

member of her crew called upon to risk, in the slightest degree, either life or limb, or to perform any more hazardous thing than he would ordinarily be called upon to do in a day's work. No member of the crew of the "West Inskip," so far as we know, was called upon to perform any additional service during the time that vessel was going to the "Deuel's" assistance, or while the "West Inskip" was standing by, which was about forty hours out of approximately forty-six hours during which the "West Inskip" was delayed on account of the salvage service. There is nothing to show that any difficulty was encountered in passing the lines between the two vessels. The hardest work performed by any of the crew of the "West Inskip" was that of her seven members who assisted during the afternoon and evening of December 15, 1921, in shifting and jettisoning a portion of the deck cargo of the 'Deuel," and it does not appear that there was any risk attached to this labor.

An award of a full two months pay to each of the libelants under the circumstances seems clearly excessive.

SPECIFICATION OF ERRORS RELIED ON BY THE APPELLANT.

1. The Court erred in awarding to the libelants, or to any of them, any amount whatsoever for alleged salvage services rendered to the S. S. "Deuel."

2. The Court erred in awarding to the libelants, and to each of them, two months pay for salvage

services alleged to have been rendered by them to the S. S. "Deuel" and in awarding to said libelants, and to each of them, any amount in excess of one month's pay to each of them as compensation for said alleged salvage services.

3. The Court erred in failing to render a decision and order judgment entered in favor of the said appellant, the United States of America, dismissing the libel of said libelants filed in said cause.

4. The Court erred in awarding to the said libelants, and to each of them, any amount whatsoever, for the reason that said libelants were at the time of the alleged salvage services members of the crew of a vessel belonging to the United States of America, and rendered salvage services, if any, to a vessel likewise belonging to the said United States of America, and by reason thereof it became the duty of the said libelants, and each of them, to render said services without compensation beyond their wages as seamen on said United States vessel.

BRIEF OF THE ARGUMENT.

Considering the nature of the salvage service rendered in this case, an award to those of the members of the crew of the "West Inskip" who are libelants in the suit equivalent to $10,740.00, if all the officers and members of the crew had been parties, is excessive. The crew of the "West Inskip" were never in any danger, and except seven of them, who assisted in shifting the cargo of the "Deuel," they

were not called upon to perform any unusual labor. The salving vessel was pulling on the "Deuel" less than five and one-half hours. The remainder of the time, about 40 hours, the "West Inskip" was merely standing by. So far as the United States is concerned, the only property at risk was the "Deuel," having a value of $1,762,000.00. The "Deuel's" cargo was privately owned, and no award for the salvage of it can be made in this case.

A comparison of the award in this case with that in *The Kia Ora,* 246 Fed. 143, which so far as we can ascertain is the largest award on record in any case of stranding, will be of interest. The "Kia Ora," on a voyage from Australia to London, while going full speed grounded on a coral reef in the Bahamas in February. She was rescued by the wrecking steamer "Relief" with a crew of 70 men, which came from Kingston, 360 miles distant. The "Relief," which had been specially built and equipped for salvage work at a cost of $450,000.00, in response to wireless calls for assistance, reached the "Kia Ora" in 2½ days and carried on salvage work for five days thereafter. During the progress of the work it became necessary to jettison cargo of the "Kia Ora" to the value of $428,000.00. The salvage work was successful, and the "Relief" was the only vessel available that could have rendered the service. The libelant, in addition to specially building and equipping the "Relief," maintained a plant at Kingston at an annual cost of $36,000.00, especially for wrecking purposes. It was conceded

in the case that the "Relief" worked hard, under great difficulties, having strong winds and current, and a very nasty swell to contend with, and the "Kia Ora" was in great danger at the time from gales to be anticipated at that season of the year. The Court held that the services were of a peculiar and highly meritorious character, and in making an award for the whole service of $100,000.00, the Court took into consideration the fact that the salvers were experienced, that no other assistance was available, that the "Kia Oro" was in a dangerous condition, and that the work was performed under bad weather conditions, and said that practically every element calling for reasonable salvage existed. The values at risk were the largest in any reported case, being $4,000,000.00 as found by the Court, and $5,500,000.00 as claimed by the respondent. The award made figured 2½% of the value as found by the Court, or 2% of the value claimed by the respondents. In other words the value at risk, and concerning which the libelants were entitled to claim salvage, amounted to approximately 2½ times that involved in the present case, and there exists in the present case scarcely any of the elements that are found in the "Kia Ora" case that go to make up a meritorious salvage case of a high order. The award in the "Kia Ora" case, however, is much less in proportion, notwithstanding the hazardous nature of the undertaking, than the award now under discussion.

In *The Noelle,* 263 Fed. 590, a total award of only $35,000.00 was made, in a case where the peril, both

to the vessels involved and to their crew, was infinitely greater than the peril shown to exist in this case. The S. S. "Noelle," worth with her cargo and freight $1,625,000.00, stranded nine miles off Hatteras, a well-known dangerous locality. The salving vessel was the only one available, and in performing the services expended $3,000.00 and lost two days' time. She had been especially equipped for that kind of work, and was worth $175,000.00. The stranding occurred at a particularly dangerous place known to the maritime world as the "Graveyard of the Atlantic," where even slightly increased weather conditions would in all probability have resulted in the total loss of the "Noelle." The salving vessel performed the service entirely unaided, either by other vessels or by the lightening of the vessel in distress.

The two cases just cited are instances where large awards have been made because of the particularly hazardous conditions existing, but in *The Tordenskjold,* 255 Fed. 672, where the conditions more nearly approached those which existed in the present case, a much reduced award was made by the appellate court. The 'Tordenskjold grounded some 14 miles south of Hilsborough Light, on the Florida coast, and there could be no question, the Court said, that any ship ashore on the Florida reefs, exposed as that one was to the full force of the sea, was in great peril. The "Tordenskjold," which had a value of about $1,000,000.00, was salved by a tug of the value of $85,000.00. The weather was fine during the

salvage operations, but the position of the disabled vessel was one of extreme danger. There were no elements of heroism or danger to life involved. The District Court made a total award in the case of $40,000.00, but on appeal the Circuit Court of Appeals awarded the sum of $10,000.00 to the rescuing vessel, saying *that the award of the District Judge indicated that undue weight was attached to the value of the property saved, and that there was a lack of due consideration of the absence of such attending circumstances as would justify the liberality evidenced by the decree.* The sum of $10,000.00 included, of course, compensation to the rescuing vessel as well as to her officers and crew.

Another case somewhat similar to the case at bar, but where the danger, perhaps, to the disabled vessel was not as great, is that of *Jacobson et al.* vs. *Panama R. Co.,* 266 Fed. 344, where the S. S. "Panama" stranded on a reef 50 miles west of Port au Prince, about 10 miles from the Island of Haiti. She was salved by the S. S. "Neptunas," but as in the case of the "Deuel," the disabled vessel was lightened mainly by stevedores before the salvage service was completed. The District Judge made an award of $2,000.00 for the salvage service, but this on appeal was reduced to one-fourth of the amount.

The conditions surrounding the salving of the "Teresa Accama," (254 Fed. 637) were very similar to those that existed in connection with the salving

of the "Deuel" by the "West Inskip." The "Teresa Accama" grounded off False Cape, some two miles northeast of the life-saving station, and about 20 miles south of Cape Henry. Her value, including cargo, was about $2,000,000.00. She was salved by the "Rescue," a large wrecking vessel worth with her outfit about $250,000.00. The salvage operations were conducted in good order, and no special danger was incurred by the salvors. The work was intelligently and expeditiously performed. The "Teresa Accama' was in considerable danger, having regard to the character of the coast, the depth of the water, and the nearness of the vessel to shore, especially in case of a change of wind to eastward, and having regard also to the other weather conditions reasonably to be anticipated at the time. The Court awarded for the whole service, including towing the "Teresa Accama" to a safe place after she had been pulled off, the sum of $12,000.00, which included the claim of the owner of the "Rescue" as well as her officers and crew. *In the present case had an award on the same basis been made to the members of the crew of the "West Inskip," it would have amounted to about one-half month's pay to each of them.*

In *The Flottbek,* 118 Fed. 954, where a sailing ship lay for two days and nights within a few hundred feet of rocks along the Coast during stormy weather and heavy seas, being held only by her anchors, and was rescued at considerable peril owing to the heavy seas, the salved vesel being in great peril,

the Circuit Court of Appeals reduced awards to the officers and crew of the rescuing vessel amounting to $3830.00, and to the captain, officers and crew of three tugs amounting to $5,000.00, and said that the appellate courts are the final arbiters, and it is their duty to decide the questions fearlessly and impartially, with an eye single to reach the ends of justice.

In *The Apalachee,* 266 Fed. 923, the weather conditions were much worse and the danger greater than in the case now before this court. There steam tugs aided in pulling off the "Apalachee" worth $450,000.00, from a sand bar where she had stranded. It was doubtful whether the final result was not attained by the "Apalachee" alone. The Court in this case awarded $10,000.00 for salvage in addition to the damages sustained by the tugs, and of this amount set apart 80% to the owners of the rescuing vessels and 20% to the crews, apportioned according to their wages.

Another case where the circumstances are very similar to those involved in the rescuing of the "Deuel" by the "West Inskip" is that of *The Professor Koch,* 260 Fed. 969. In that case a barque had stranded on a ledge during fair weather. There was no immediate danger to the vessel, but it was in a bad position, exposed to the full force of the sea if a storm had arisen. The barque was pulled off by tugs, and finally placed in a safe condition,

the work consuming about 200 hours. The commercial value of these services was about $2,300.00. The work was done in moderate weather, within 15 miles of the home port of the salvor. Considerable skill was used, and the work done "exactly" from start to finish. The Court held under these circumstances that the libelants were entitled to the market value of the services plus a fair reward for the risk to them, which was little, for the promptness, for the skill displayed, and for the success, and fixed $10,000.00, which was about four times the commercial value of the services, as a reasonable amount. No order was made in this case as to what proportion should go to the crew and what proportion to the owners.

It will be noted from the cases cited that except in extraordinary cases where either the property of the salving vessel is at great risk, or the members of her crew are in considerable danger and perform hazardous labor, the policy of the courts, particularly as indicated by the recent cases, is not to make large awards for trifling services merely because the values salved are large, but the tendency is, and rightfully so, to compensate both the owner of the rescuing vessel and her officers and crew, on the basis of the actual services performed by them, with the addition of a reasonable amount for the purpose of encouraging the undertaking, whenever necessary, of salvage work. As stated in *The Gambetta,* 74 Fed. 259, the exact value of the property

saved, when large, is a minor element in computing salvage, and as it increases the rate per cent given is rapidly reduced. It is compensation for actual service rendered, and a reasonable gratuity for the benefit of commerce that is contemplated, and not a fixed percentage of the property saved. In *The Wellington,* 52 Fed. 605, the Court said that when the value of the salved ship is small the salvors are entitled to a larger per cent than where it is large, and where the value of the salving vessel, and therefore the owner's risk, is large, the award should be greater, and the ratio of the owner's share to that of the master and crew should be larger, than where the value of the salving vessel is small.

Counsel for the respondent in the case of *The Kia Ora,* 246 Fed. 143, insisted that in fixing a salvage allowance the Court should not undertake to base the same upon a percentage of the value saved, because such a method is antiquated, and should no longer be followed, and the Court in that case concurred in that view to the extent of saying that it was not the proper, and certainly not the practical rule of arriving at a fair and just compensation where the values are large. The reason for this is apparent. In the olden days, when vessels were comparatively small and inexpensive, the owner had little at risk compared to the owners of the huge steamships of these later days, and consequently the proportionate share formerly awarded to the crews was infinitely larger than can or should be

allowed under present conditions. The manner, too, in which modern steamships are operated, whether on their ordinary voyages or when engaged in salvage services is vastly different from the old conditions, and where formerly every member of the crew in all probability took an active part in the salvage services and exposes himself to considerable personal risk, we find now that the great majority of the crew, as was the case in the present instance, are not active in the salving service at all, and perform no work or labor beyond that which they are ordinarily called upon to perform in a day's work.

To award to members of a crew who take no active part in salvage work, large compensation based mainly not upon service but upon values at risk, would be to impose an unreasonable burden upon merchant shipping, and unless there is something out of the ordinary about the salvage service rendered, or some element of personal risk, or some unusual labor performed, there is no good reason why the members of a crew of a steamship should be awarded anything more than compensation for the actual service rendered, and that reasonable gratuity that the cases speak of for the benefit of commerce in general, and it is respectfully urged that this court apply these principles in the case now before it. A careful examination of the facts in this case will show that there was nothing extraordinary or hazardous about the services rendered

to the "Deuel" by the "West Inskip" and nothing that would call for an award equivalent to over $10,000.00 for the benefit of the officers and members of the crew alone.

JOHN T. WILLIAMS,
United States Attorney.

FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty.
Proctors for Libelant.

No. 3686

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

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BRIEF FOR APPELLEES.

H. W. HUTTON,
Proctor for Appellees.

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THE UNITED STATES OF AMERICA,
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BRIEF FOR APPELLEES.

In the above appeal, the lower court found as follows (page 26 of Transcript):

> "It is admitted that libelants are entitled to some award for salvage, the only question being as to the amount. Considering all the circumstances, I think an award equal to two months' pay to each libelant will be fair. A decree will be entered accordingly."

The only question on this appeal is, Is the above amount unfair?

The values salved were as follows (pages 23 and 24 Transcript):

The value of the vessel was	1,762,000.00
The cargo	1,500,000.00
	3,262,000.00

The total award was two months pay, which would equal $10,740.00 for her master and crew. Our contention is that that amount is low, rather than high.

The Deuel went on shore at high water, with falling neap tides, December 14th, 1919, at 9:05 A. M. The West Inskip backed in, dropped both anchors, and pulled on hawsers from her stern to the stern of the Deuel from 9:15 P. M. to 10:06 P. M. of the 14th (Trans. pages 51-52) and from 8:30 to 10:50 A. M. of the 15th, without any movement of the vessel. The fore peak of the Deuel was leaking, the crew of the Deuel assisted by the crew of the West Inskip and others threw some of the cargo overboard, and shifted the other cargo, the P. M. tide of the 15th serving badly (Transcript pages 42-43). On December 16th at 10:30 A. M. a united effort was made by the West Inskip and the Deuel and at 11:20 the vessel floated,

> "having been towed off by the S. S. West Inskip and into deep water, also assisted by the S. S. Deuel going full speed astern all the time the effort was being made and up to the time of refloating".
>
> (Trans. page 45.)

> "The refloating of the Deuel in such quick time is mainly due to the masterly way in which Captain Tibbets of the West Inskip placed his ship in position and then rendered very efficient service".
>
> (Trans. page 46.)

The crew of the West Inskip unquestionably assisted its master and enabled him to execute the floating of the Deuel.

> "In conclusion it may be said the bottom where the Deuel stranded is rocky and uneven and is much broken up all around. The nearest land above water was fully 1¼ miles off. The position was fraught with danger insomuch that a westerly wind (the prevailing winds at this season) would have materially lessened the Deuel's chances. Moderate and fine weather prevailed."

The above shows that the service was highly meritorious. A Lloyd's surveyor went on board on the 15th, and it appears that on the 15th some of the deckload of lumber was thrown overboard, and on the 16th, it appears as follows:

> "It was then decided by the Lloyd's surveyor ordered the balance of deckload forward and aft thrown overboard to lighten the vessel as quickly as possible."
>
> (Trans. page 53.)

Substantially the same entry appears on Transcript page 48. The surveyor himself says on Transcript page 46 that his charge is made for

> "advising Master, assisting to refloat, taking steamer to Yokohama and reporting on refloating of six hundred yen"

We fail to see why appellants should lay such stress on the charge of the surveyor. He assisted, but he did not take charge, in the work. On the contrary, the Transcript shows the masters of the

vessels executed the orders (Trans. pages 43-44). We do not wish, however, to speak lightly of what anyone did in the successful undertaking; however, we wish to call the court's attention to the fact that no one person is bound by what another charges for his work. The question before the court in this case is, What is a fair award? And again the charge made by the surveyor was made in a country where the purchasing power of money is probably about five or six times greater than it is in this country, and where salaries are five or six times smaller.

Argument.

We think that twenty-five per cent (25%) of a total award is what is usually allowed the crew of a salving vessel. Under that division, the total award in this case would be four times what the lower court awarded the crew, or four times $10,740.00 or $42,960.00.

It appears that the underwriters had agreed to the sum of $45,000.00 for the whole service; but wished to pay the crew only $5000.00 or about a trifle over 11 per cent. We understand that the $45,000.00 was for the cargo of the Deuel alone (Trans. pages 15 and 19).

Two interrogatories were propounded (Trans. page 11): one as to what the Deuel was expected to pay, and the other what the cargo was expected to pay, and we feel certain the cargo has to pay $45,000.00.

25% of that amount would be	$11,250.00
The amount awarded is	10,740.00
Amount it is small	$ 510.00

or 23.18 per cent of the total, and $45,000.00 is but but 1.377% of $3,362,000.00, the total value of the property salved.

In appellant's brief, the United States offers as reasons for a reduction, cases where the total award was 2½ per cent of the value of the property salved. We submit that it is not injured where but 1.377% is the gross award and the crew fail to get 25% of that.

On page 10 of appellant's brief, the case of The Kia Ora is mentioned. As stated in the brief, it is valueless, as the Court of Appeals increased the amount awarded from $100,000.00 to $150,000.00 in the following citation:

The Kia Ora, 252 Fed. 507.

We call the court's particular attention to that case.

It is stated in the brief that the values of property saved in that case were 2½ times greater than the values in this case. The actual values in that case were $3,901,173.

To be 2½ times greater the total values in that case would have to be $8,155,000.00.

The true increased values in that case are about 16.4% of the values in this case—not 250%, and, on the basis of that case, the total award in this should be $135,940.00.

25% of which to the crew would be $33,764.00.

In the case of The Noelle, also cited, the values were about one-half of what they were in this case. The award was $35,000.00.

Double that would be $70,000.00.

25% to the crew would be $17,500.00.

In this case the West Inskip was engaged on the 14th, 15th and 16th days of December. In the Noelle case, the tug arrived on the scene at 6 A. M. of the 19th, commenced to pull at 10:15 A. M. and the vessel came off at 2:45 P. M. the same day. There is no comparison between the cases as to the merit of the service, the merit being all with this case.

The case of Jacobsen v. The Panama, etc., is of little value as no values are given. The Panama went ashore where no storms ever prevail, on a soft bottom of coral sand, and the Potomac and Gorgas assisted in the work, the latter vessel being there but it is not clear what she did. If the value of the Panama was known, it might appear that that award was larger than this.

In the case of the Teresa Acama, it was claimed that it only took 45 minutes to do the work and that the real floating was done by reason of the salved vessel having pumped out 300 tons of water ballast. She was valued at $2,000,000.00. An award of $12,000.00 was made. The values in that case were but about 61% of the values in this. A proportional award for time consumed and values in this case

would amount to approximately $100,080.00, as it took more than five times as long in this case, and the award to the crew on a basis of 25 per cent would be about $25,000.00. The time actually towing in this case was between four and five hours. In that case 45 minutes. In this case the vessel was engaged in the service the whole of one day and part of two other days. In the Teresa Accama case about 8 hours and 45 minutes.

In the case of the Apalache, the vessel was of the value of $450,000.00. She went ashore on December 24th at high tide. She reduced her draft from 18 to 13½ feet and the tugs arrived at 11 P. M. of the 24th. The vessel came off early on the morning of the 25th, no doubt by reason of her reducing her draft four and one-half feet by pumping out water. The award was $10,000.00, on values alone. Not considering the increased time taken in this case and greater danger, the award would be $72,-500.00, as the values here are about 7.25 times greater than in that case. We will now take up what proportion of the total value of a salvage service a crew should get.

In the days of sailing vessels it was never less than one-half; now it seems to run about 25%, as the following cases show:

In Jacobsen v. The Panama, 266 Fed. 793, the crew were allowed one-fourth.

In the F. V. Barstow, 257 Fed. 793, the crew were allowed one-third.

In the case of The Kanawha, 254 Fed. 762, the crew were allowed one-fourth.

In the case of The Meldershim, 249 Fed. 776, the crew were allowed one-fifth.

In the case of The Figueroa, 247 Fed. 358, $30,000.00 was allowed, the master receiving $5000.00. Of the remaining amount the crew received one-half, the owners of the salving vessel one-half.

In the case of The Coquitlam City, 242 Fed. 767, one-fourth was allowed the crew.

In Conklin v. Lockard, 231 Fed. 540 and 239 Id. 380, one-fifth was allowed the crew.

As to additional cases on total awards, we cite the following authorities:

The Melderskin, 249 Fed. 776.

The vessel was towed 819 miles, the values were $1,450,029.00, the award was $45,000.00.

In the case of

The Celtic Chief, 145 C. C. A. 63,

a stranding case decided by this court, the values were $136,000.00; the award, $19,000.00.

The F. B. Barstow, 257 Fed. 792,

The values were $3,000,000.00; the award, $50,000.00.

We respectfully submit that the award in this is low and not high.

II.

BEFORE A SALVAGE AWARD CAN BE MODIFIED THERE MUST BE AN ABUSE OF DISCRETION.

The Kanawha, 166 C. C. A. 208;
Jacobsen v. Panama, etc., 266 Fed. 346.

III.

THE UNITED STATES IS LIABLE FOR SALVAGE SERVICES TO THE CARGO.

On page 6 of appellant's brief we find the following:

> "For the salvaging of the privately owned cargo the libelants of course have no claim against the United States."

There are no authorities or argument in the brief on that point. We, however, respectfully call the court's attention to the act of March 9th, 1920, which in terms and spirit makes the United States liable for all claims against a cargo it is carrying, or possesses, and expressly authorizes an action *in personam* against the United States to enforce such claims, it reading in part:

> "Sec. 1. * * * and no cargo owned *or possessed* by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions; * * *
>
> "Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed a

> proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, *a libel in personam may be brought against the United States* or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug operated by such corporation."

The act is found in 41 Stat. at Large, page 525. The title of the act reads:

> "An act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions and for other purposes."

The purposes of the act are explained in

> Banque Russo etc. v. U. S. Shipping Board, 266 Fed. 897, 898-899,

where the court said that it was to prevent ships and cargoes being carried by the United States from being hindered in transportation.

Section 8 of the act expressly makes the United States liable for the payment of the decrees. So we find a law that says that if any cargo in the possession of the United States has been proceeded against, an action *in personam* may be brought against the United States, and that it must pay the decree.

IV.

THE CREW OF ONE MERCHANT VESSEL OWNED BY THE UNITED STATES ARE ENTITLED TO SALVAGE FOR SALVAGE SERVICES RENDERED ANOTHER GOVERNMENT VESSEL.

There does not appear to be anything in the record indicating that the West Inskip was owned by the United States; but if she was it makes no difference. See

Act of August 1st, 1912, 37 Statutes at Large 242;

Jacobsen v. The Panama, 246 Fed. 347;

Rees v. United States, 134 Id. 347.

And Sec. 10 of the Act of March 9th, 1920, which reads:

> "That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its benefit, and not for the benefit of the crew. * * *

It is clear, therefore, that the crew of a merchant vessel operated by the United States may claim compensation for salvage services rendered another vessel so operated, and cargo in the possession of the United States.

In conclusion, we beg to state, that $10,740.00 does not seem to be a very large amount to pay a crew for work on three different days and saving property worth over three millions of dollars and we fail to see any abuse of discretion.

Salvage compensation is in the nature of a reward, and, for the benefit of trade and commerce, lives are sometimes saved by salvors; and no one can tell when lives will be again in peril on the seas. To stimulate efforts to save life and property in danger on the sea these awards are made. This salvage service was rendered December, 1919. After almost two years of litigation the crew are still struggling for what is justly due them, and met with what we find on page 13 of the government brief, in italics, that one-half month's pay would be enough, when a proper computation of the facts of both cases shows that the award in this case is lower than the award in that. Any argument such as made on that page is fallacious. How can it be possible that a service that took but 45 minutes to perform and a total service of 8 hours and forty-five minutes, on $2,000,000.00 worth of property, can be worth as much as a service that consumed three days, with between four and five hours towing, the throwing of cargo overboard on $3,262,000.00 worth of property?

We respectfully submit the award of the lower court should be increased with costs and interest.

Dated, San Francisco,
October 19, 1921.

H. W. Hutton,
Proctor for Appellees.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,
vs.
OTIS E. MILES, et al,
Appellees.

No. ~~3886~~ 3686

THE UNITED STATES OF AMERICA,
Appellant,
vs.
R. J. NELSON, et al,
Appellees.

No. ~~3887~~ 3687

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty.

JOHN T. WILLIAMS,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant U. S. Attorney in Admiralty,
Proctors for Appellant.

Neal, Stratford & Kerr, S. F 17034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA, *Appellant,* vs. OTIS E. MILES, et al, *Appellees.*	No. 3886
THE UNITED STATES OF AMERICA, *Appellant,* vs. R. J. NELSON, et al, *Appellees.*	No. 3887

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty.

In the opening briefs of the United States it was assumed that no salvage award could be made in these cases to the crews of the salving vessels on account of cargo, but the briefs of the appellees and

the oral argument of their counsel indicate that they are claiming not only for the salvage of the vessels involved but for the salvage of the cargo carried by them, although that cargo was not owned by the United States.

The decrees of the District Judge also show that he considered the salving of the cargoes in making the awards.

The contention of the United States that the salving of the cargoes is not an element in these cases and should not have been considered is not intended to be an admission that should it be held otherwise the awards actually made are not excessive. The argument made by the United States in the opening briefs that compensation for salvage services, where the values at risk are very large as in these cases, should not be fixed on the basis of those values, but on the basis of services rendered, is still insisted on.

The right of the appellees to sue the United States is based upon the Act of Congress of March 9, 1920, known as the "Suits in Admiralty Act." The first section of this act provides as follows:

> "That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and *no cargo owned or possessed by the United States* or by such corporation, *shall hereafter, in view of the provisions*

herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company."

The only effect of this section is to prohibit the seizure by judicial process of any vessel or cargo owned or possessed by the United States or by the corporation referred to.

The second section of the Act provides that in cases where if such vessel were privately owned or operated, or *if such cargo were privately owned and possessed,* a proceeding in admiralty could be maintained at the time of the action, *a libel in personam may be brought against the United States* or the corporation as the case may be, provided that the vessel is employed as a merchant vessel or is a tug boat operated by the corporation.

This is the provision of the act that creates the cause of action against the United States, and by its express terms it limits suit against the United States to cases where the cargo is both *owned and possessed* by the United States.

There is apparently a discrepancy between the language of section one to the effect that no cargo owned *or* possessed by the United States shall be subject to arrest or seizure, and that contained in section two which limits the suit authorized to cases where the cargo is owned *and* possessed, but this apparent discrepancy disappears if the word "pos-

sessed'' is given a meaning somewhat broader than a mere naked possession, such as a carrier of goods would have who has no interest whatever in the goods themselves, and giving to the word ''possessed'' that broader interpretation will harmonize the two sections.

Such a construction was given to the word ''possession'' in the case of *Emerson v. State,* 25 S. W. 289, 290, where the court held that ''possession'' and ''custody'' are not convertible terms, and that *to constitute possession mere temporary custody is not sufficient but there must be combined with it the control, care and management of the property.*

The United States did not own the cargo aboard the vessels at the time they were salved. It does not appear that the United States had the slightest interest in that cargo even to the extent of unpaid freight moneys. Had the vessels and their cargo been ''privately owned,'' using the language of the statute, the owner of the vessels would not have been liable in admiralty for the salvage of the cargo unless they also owned it. As the United States did not own the cargo and so far as the record shows had no interest in it, it certainly should not be held liable for the cargo's salvage.

Section three of the ''Suits in Admiralty Act'' says that *the suits* instituted against the United States *shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between pri-*

vate parties. Under no existing principle of law or rule of practice could the owner of a vessel be held liable for the salvage of cargo on that vessel when the cargo was not owned by him and he had no interest whatever in it.

It is respectfully submitted that the Act does not create any liability against the United States on account of the salvage of cargo in these cases.

Dated, San Francisco, California,
October 29, 1921.

JOHN T. WILLIAMS,
United States Attorney,

FREDERICK MILVERTON,
Special Assistant U. S. Attorney in Admiralty,
Proctors for Appellant.

No. 3687

United States

8

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES VAN ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,
Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3687

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES VAN ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULTZ, S. H. HENRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondent.

Praecipe for Transcript on Appeal.

To the Clerk of the Southern Division of the United States District Court, in and for the Northern District of California:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office

of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal and assignment of errors heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Statement under Admiralty Rule 4.
2. All of the pleadings, with the exhibits and interrogatories and answers to the interrogatories annexed thereto.
3. All of the testimony and other proofs, including stipulations as to the facts, adduced in the cause.
4. The opinion of the Court. [1*]
5. The final decree.
6. The petition for appeal, order allowing appeal, and notice of appeal.
7. The assignment of errors.
8. The supersedeas.
9. The citation on appeal.
10. The clerk's minutes.
11. This praecipe.
12. Clerk's certificate to transcript.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days after the filing of the notice of appeal in said cause.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

Dated this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondents.

Service of a copy of the foregoing praecipe for transcript of record in the above-entitled cause is hereby admitted this 14th day of April, 1921.

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16,871.

R. J. NELSON et al.,
Libelants,

vs.

The Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, etc., and Cargo, and THE UNITED STATES OF AMERICA,
Respondents,

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: R. J. Nelson, M. Burns, Jas. Allen, R. W. Kelly, C. Vanderley, G. Swanson, C. B. Petterson, K. H. Niemi, Peter Emmers, S. Johannsen, Andries, van Roon, Lenhart Saarnia, L. R. Drake, F. Jorgensen, A. A. Krutmeyer, John R. Whalen, V. J. Risardo, C. J. Sullivan, J. E. Gough, A. H. Lake, P. S. Murray, E. J. Farrell, R. Schultz, S. H. Hinrichi, D. L. Heywood, James Moore and Patrick O'Mara.

Respondents: The Steam Vessel "City of Omaha," Her Engines, Boilers, Tackle, Apparel and Furniture, and Her Cargo, and The United States of America. [3]

PROCTORS.

For Libelants: H. W. HUTTON, Esq.

For Respondents: FRANK M. SILVA, Esq., United States Attorney, and E. M. LEONARD, Esq., Assistant United States Attorney, San Francisco, Calif.

PROCEEDINGS.

1920.

June 18. Filed libel for salvage, with interrogatories attached.

Issued monition for the attachment of the "City of Omaha," which was returned with the following endorsement thereon: "Returned

not executed by order libelant's attorney.

J. B. HOLOHAN,
United States Marshal.
By G. C. White,
Deputy.

San Francisco, Cal., June 22, 1920."

22. Filed amended libel and interrogatories.

July 6. Proclamation duly made.

August 14. Filed answer to libel and answers to interrogatories.

November 5. This cause came on this day for hearing, before the Honorable MAURICE T. DOOLING, Judge, and was ordered submitted.

Filed deposition of A. C. Norris, taken on behalf of respondents.

1921.

February 18. Filed opinion, in which it was ordered that a decree be entered in favor of libelants, to the extent that each libelant recover a sum equal to two months' pay. [4]

1921.

March 1. Filed final decree.

2. Filed proposed modifications of decree.

3. It was this day ordered that the motion of the proctor for respondent to strike out certain lines of the decree be granted.

22. Filed stipulation in regard to certain facts pertaining to the order modifying decree.

April 15. Filed notice of appeal.
Filed petition for appeal.
Filed assignment of errors.
Filed citation on appeal.
Filed supersedeas.

18. Filed stipulation and order that the original exhibits be transmitted to the United States Circuit Court of Appeals. [5]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—(No. 16,871).

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, GUST SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANSSEN, ANDRIES van ROON, LENNART SAARNIA and L. R. DRAKE and F. JORGENSEN,
Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines and Boilers, Tackel, Apparel and Furniture and Cargo,
Respondents.

(Libel.)

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court:

The libel of the libelants above named against the steam vessel "City of Omaha," her engines and boilers, tackle, apparel, and furniture, and her cargo, and against all persons lawfully intervening for their interest therein in a case of salvage, civil and maritime, alleges as follows:

I.

That on all the dates and times herein mentioned the steamship "City of Omaha" was and now is an American vessel, and at the time of the filing of this libel she is lying in the port of San Francisco with her cargo hereinafter mentioned on board thereof, within the district of the above-named Honorable Court.

II.

That on all of the dates and times herein mentioned the steamship "Cockaponset," was and now is an American vessel, and on all of said dates and times libelants, who are all residents of the Northern District of California, were employed on her in the following capacity, and at the following rates of wages: [6]

Libelant M. Burns, as First Mate, at the wages of $228.25 per month.

Libelant James Allen as Second Mate, at the wages of $200.00 per month.

Libelant R. W. Kelly as Third Mate, at the wages of $176.25 per month.

Libelant C. Vanderley as Carpenter, at the wages of $105.00 per month.

Libelant Gust Swanson as Boarswain, at the wages of $95.00 per month.

And libelants R. J. Nelson, C. B. Petterson, K. H. Niemi, Peter Emmers, S. Johansson, Andries van Roon, Lennart Saarnia, and F. Jorgenson as Able Seamen, at the wages of Ninety ($90.00) Dollars per month, and libelant L. R. Drake as Ordinary Seamen, at the wages of $65.00 per month.

III.

That heretofore and on the 28th day of May, 1920, while said vessel was on the high seas bound to said San Francisco, and about 170 miles or more to the south of Cape St. Lucas, which is the extreme southerly end of Lower California, and while libelants were on board in the capacities and at the rates of wages aforesaid, said vessel took in tow the said steam vessel "City of Omaha," which was then lying helpless by reason of her boilers being entirely incapable of use, and towed said vessel with a cargo she then had on board from said place where she was so taken in tow to San Pedro, in California, and then delivered her and her said cargo safely, such delivery taking place on the 5th day of June, 1920, the distance covered by said towing being approximately 900 miles, each of libelants assisting in the capacities aforesaid in said work.

IV.

That the said vessel "Cockaponset" was called by wireless message to the assistance of said "City

of Omaha" and her cargo, and at the time she was taken in tow as aforesaid she had been lying helpless for about three days, having no means of propulsion or generating [7] lights on board, and was in almost total darkness at night-time, and she had also theretofore suffered some damage to her hull, the nature and extent of which libelants do not know; that said vessel had theretofore put into Salina Cruz, Nicaragua, for repairs, which repairs were ineffectual, and after leaving there and proceeding to where she was picked up by the "Cockaponset" as aforesaid, she became totally disabled, helpless and with her cargo in danger of total loss, she being subject to currents which would likely have carried her on shore, and also subject to any storm that might have arisen; that said towing was accomplished with a hawser made up of a steel rope attached to an anchor chain, the total length of which was about eighty fathoms, which said hawser broke once in towing.

V.

That on their information libeltnts allege that the value of the said "City of Omaha" as delivered at said San Pedro was the sum of about $1,750,000 and the value of her said cargo so delivered was the sum of about $2,000,000.00 *dollars* the said cargo at all of the times aforesaid being in equal danger of loss with said vessel.

VI.

That both of said vessels were merchant vessels of the United States of America on all of said dates and times.

VII.

That by reason of the premises, libelants each pray this Honorable Court to make a salvage award to each of libelants for their services aforesaid to said "City of Omaha" and her said cargo, which shall be just and reasonable.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. [8]

WHEREFORE, libelants pray that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said steam vessel "City of Omaha," her engines and boilers, tackle, apparel and furniture, and cargo, and that all persons claiming any right or interest therein may be cited to appear and answer under oath all and singular the premises aforesaid and the interrogatories hereto attached, and that this Honorable Court will be pleased to make a reasonable salvage award to be paid by said vessel and her cargo to each of the libelants, and that said vessel and her said engines and boilers and her said cargo may be condemned and sold to pay the same with costs, and that libelant may have such other and further relief as the Court is competent to give in the premises.

R. J. NELSON,
Libelant.

All of the Other Libelants in the Caption Thereof Named,

By H. W. HUTTON,
Their Proctor Thereto Authorized.

H. W. HUTTON,
Proctor for Libelants.

United States of America,
Northern District of California,—ss.

R. J. Nelson, being first duly sworn, deposes and says as follows:

I am one of the libelants above named and herein; I have read the foregoing libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

R. J. NELSON.

Sworn to before me this 17th day of June, 1920.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California. [9]

Interrogatories Attached to Libel Which are Required to be Answered Under Oath.

1. When was the steam vessel "City of Omaha" launched?
2. What did it cost to build her?
3. What was the value of her cargo when she left her port of first departure with said cargo on board?
3. On what voyage was she bound when picked up by the "*Cockponset*"?

4. Had the "City of Omaha" stopped at any port on such voyage for repairs on such voyage; if so, what repairs and where?
5. Had the "City of Omaha" suffered any damage to her hull on said voyage; if so, what damage and where was it suffered?
6. How long had the "City of Omaha" *lied* helpless at the time she was picked up by the *"Cockponset"*?
7. In what latitude and longitude did she become helpless?
8. In what latitude and longitude was she picked up?
9. How close to the shore was she when picked up by the *"Cockponset"*?
10. What was the value of the "City of Omaha" when towed in to San Pedro by the *Cockponset"*?
11. What was the value of the cargo of the "City of Omaha" when she was towed into San Pedro by the *"Cockponset"*?
12. What trouble existed on board of the "City of Omaha" that caused her to become helpless?
13. When did such trouble first commence?
14. In what latitude and longitude was the "City of Omaha" when such trouble first commenced?

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed Jun. 18, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—(No. 16,871).

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULTZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines and Boilers, Tackle, Apparel and Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

Amended Libel.

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court:

The amended libel of the libelants above named, filed as of course, against the steam vessel "City of Omaha," her engines and boilers, tackle, apparel and furniture and cargo, and against all persons

lawfully intervening for their interest therein, and against the United States of America, a nation, in a cause of salvage, civil and maritime, alleges as follows:

I.

That at all of the dates and times herein mentioned the steam vessel "City of Omaha" and the steam vessel "Cockaponsett" were and now are merchant vessels of the United States of America, owned and operated by either United States Shipping Board, or United States Shipping Board Emergency Fleet Corporation, both of which are corporations organized and existing as capital stock corporations under and by virtue of the acts of the Congress of the United States, and on all of said dates and times the United States of America owned and now owns all of the capital stock of each of said corporations. [11]

II.

That at the time of the filing of the original libel herein the said "City of Omaha," with the cargo hereinafter mentioned on board, was and now is lying in the port of San Francisco, State of California, and on all of said dates and times the said cargo was and now is in the possession of the operator of said vessel aforesaid.

III.

That on all of said dates and times libelants were employed on board of said steam vessel "Cockaponsett" in the following capacities and at the following rates of wages, to wit:

Libelant M. Burns as First Mate, at the wages of $228.25 per month.

Libelant James Allen as Second Mate, at the wages of $200.00 per month.

Libelant R. W. Kelly as Third Mate, at the wages of $176.25 per month.

Libelant C. Vanderley as Carpenter, at wages of $105.00 per month.

Libelant G. Swanson as Boatswain, at the wages of $95.00 per month.

Libelants R. J. Nelson, C. B. Petterson, K. H. Niemi, Peter Emmers, S. Johanssen, Andries van Roon, Lennart Saarnia and F. Jorgensen as able seamen at the wages of Ninety ($90.00) Dollars per month.

Libelant L. R. Drake as ordinary seaman, at the wages of $65.00 per month.

Libelant A. A. Krutmeyer as Deck Engineer, at the wages of $105.00 per month.

Libelants John R. Whalen, V. J. Ricardo and C. J. Sullivan as Water Tenders, at the wages of $90.00 per month.

Libelants J. E. Gough, A. H. Lake and P. S. Murray as Oilers, at the wages of $90.00 per month.

Libelants E. J. Farrell, R. Schultz and Patrick O'Mara as Firemen, at the wages of $90.00 per month, and

Libelants S. H. Hinrichs, D. L. Heywood and James Moore as Wipers, at the wages of $90.00 per month.

IV.

That on the 28th day of May, 1920, the said steam vessel "City of [12] Omaha" was lying in a damaged condition and helpless about 120 miles

southerly from Cape St. Lucas, Lower California, the extent of such damage to said vessel being unknown to libelants excepting that she had a hole in her bow and her boilers were incapable of generating steam, and she had no means of propulsion or lighting said vessel, her said cargo then being on board as aforesaid, and she had so lied for the period of about three days in danger of total loss, when she signalled the said "Cockaponsett" for assistance by wireless telegraphy, and in due course the said "Cockaponsett" proceeded to the assistance of said "City of Omaha" and her cargo and with the assistance of libelants, who were each on board of said "Cockaponsett" in the capacities and at the rates of wages aforesaid, took the said "City of Omaha" in tow and towed her to a place of safety, to wit, the harbor of San Pedro, in the State of California, where she was safely delivered with her said cargo by said "Cockaponsett" with libelants' assistance, on the 5th day of June, 1920, having been so towed for a distance of about 900 miles.

V.

That the said towing was accomplished by means of a hawser between said vessels made up of a wire rope and anchor chain about 80 fathoms in length, which said hawser broke once in the performance of said work; that the danger to said "City of Omaha" and her said cargo consisted in her lying helpless subject to currents and storms, and she was in an unfrequented part of the ocean.

VI.

On their information and belief libelants allege

the value of the said "City of Omaha" to be about $1,750,000.00 and her cargo to be about $2,000,000.00 *dollars.*

VII.

That said "City of Omaha" was bound from Norfolk in the State of Virginia to Yokohama, Japan, with said cargo, and had prior to her being so taken in tow as aforesaid called at Salina Cruz, Nicaragua, [13] for repairs, which said repairs were ineffectual.

VIII.

That by reason of the premises, libelants each pray this Honorable Court to make a salvage award to each of the libelants for their services to said "City of Omaha" and her said cargo, which shall be just and reasonable.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelants pray that process in due form of law according to the law in such case made and provided may be served herein, and that this Honorable Court will be pleased to decree the payment to each of the libelants a salvage award herein against each of the respondents herein, with costs and interests as may be just and reasonable, and that the same may be paid as by law provided, and that libelants and each thereof may have such other and further relief as the Court is competent

to give in the premises.

R. J. NELSON,
A Libelant.

All Other Libelants in the Caption Thereof Named.

By H. W. HUTTON,
Their Proctor Thereto Authorized.

H. W. HUTTON,
Proctor for Libelants.

United States of America,
Northern District of California,—ss.

R. J. Nelson, being first duly sworn, deposes and says as follows:

I am one of the libelants above named and herein; I have read the foregoing libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

R. J. NELSON. [14]

Subscribed and sworn to before me this 22 June, 1920.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California. [15]

Interrogatories Attached to Amended Libel to Which Answer is Required.

1. When was the steam vessel "City of Omaha" launched?
2. What did it cost to build her?
3. What was the value of her cargo when she left her port of first departure with said cargo on board?

4. On what voyage was she bound when picked up by the "Cockaponsett"?
5. Has the "City of Omaha" stopped at any port on such voyage for repairs; if so what repairs?
6. Had the "City of Omaha" suffered any damage to her hull on said voyage? And where was it suffered?
7. How long had the "City of Omaha" *lied* helpless at the time she was taken in tow by the "Cockaponsett"?
8. In what latitude and longitude did she become helpless?
9. How close to the shore was she when taken in tow by the "Cockaponsett"?
10. What was the value of the "City of Omaha" when towed into San Pedro by the "Cockaponsett"?
11. What was the value of the cargo of the "City of Omaha" when that vessel was towed into San Pedro by the "Cockaponsett"?

13. In what latitude and longitude was the "City of Omaha" taken in tow by the "Cockaponsett"?

13. What defects existed on the "City of Omaha" that caused her to become helpless?
14. When and where was the vessel when such defects first exhibited themselves? And in what latitude and longitude was she at that time?

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed June 22, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULTZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines and Boilers, Tackle, Apparel and Furniture and Cargo, and THE UNITED STATES OF AMERICA,

Respondents.

Answer to Libel.

To the Honorable M. T. DOOLING, Judge of the United States Court in and for the Southern Division of the Northern District of California, First Division, in Admiralty.

The United States of America, owner of the steam vessel "City of Omaha," represented herein by Frank M. Silva, United States Attorney for the Northern District of California, comes now by and through E. M. Leonard, Assistant United States Attorney, and answering the libel in the above-entitled matter denies, admits, and alleges as follows:

I.

Answering unto the allegations of article I of the said libel, denies that at all or any of the times mentioned in [17] said libel the steam vessel "City of Omaha" and/or the steam vessel "Cockaponsett" were or are operated by either the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation, and alleges that the said steam vessel "City of Omaha" during all of said times was operated by Struthers and Dixon, a corporation, as agent, and alleges that the steam vessel "Cockaponsett" was, during all of said times, operated by Williams, Diamond & Co., a corporation, as agents.

II.

Answering unto the allegations of article IV of said libel, denies that on the 28th day of May, 1920, or at any other time, said steam vessel "City of

Omaha" was lying helpless with a hole in her bow and/or had no means of lighting said vessel, and/or was 120 miles southerly from Cape St. Lucas, Lower California, and/or that she had laid entirely helpless for any period of time, and denies that she was in danger of total or any loss or that she was in any danger by reason of damage to her hull. Alleges that said steam vessel "City of Omaha" was, by reason of boiler trouble, unable to make any headway for a period of about 24 hours before she was taken in tow by the said steam vessel "Cockaponsett"; that she was so taken in tow about the hour of twelve noon, on the 29th day of May; that during all of said 24 hours her master was and had been for some time in communication by wireless telegraph with the operators of said vessel at San Francisco, California; that arrangements has been made through said operators that either the steam vessel "Cockaponsett" or the steam vessel "Diablo," whichever should find it most convenient, should take said "City of Omaha" in tow and tow her to a place of safety; that during said 24 hours said steam vessel "City of Omaha" lay in the direct paths of all coastwise [18] vessels about 18 miles off the coast of California; that during said 24 hours the master of the steam vessel "Melville Dollar" and the master of the steam vessel "Diablo" each spoke with the master of the steam vessel "City of Omaha," and offered to take her in tow; that the steam vessel "Cockaponsett" was not taken out of her course by reason of towing said "City of Omaha"; that no extraordinary services were per-

formed by any of the members of the crew of the said "Cockaponsett"; and that the hawser and cable employed in said towing was part of the equipment of the steam vessel "City of Omaha."

III.

Answering unto the allegations of article V of said libel, denies that the said "City of Omaha" and her cargo were or was either at any time in any immediate danger by reason of lying helpless or otherwise or subject to currents and/or storms, and denies that she was at any of said times in an unfrequented part of the ocean, and alleges that she was in a part of the ocean unfrequented by storms or dangerous currents at the season of the year when she was there; that during all of the time that she was allowed to drift she drifted directly in the path of coastwise vessels; that during said times she was spoken by two steam vessels other than the "Cockaponsett," each of whose masters offered to tow her, and that at all of said times her exact location and condition was known to her said operators.

IV.

Answering unto the allegations of article VI of said libel, denies that the value of the cargo of the said steam vessel "City of Omaha" is 2,000,000 and alleges that said cargo was of the value of approximately $606,475.00. [19]

V.

Answering unto the allegation of article IX of said libel, admit that all the premises are within the admiralty jurisdiction of the United States, but deny that the allegations of said complaint are true.

ANSWER TO INTERROGATORIES.

Answer to Interrogatory 1: The steam vessel "City of Omaha" was launched on or about the 15th day of November, 1919.

Answer to Interrogatory 2: The cost of building the steam vessel "City of Omaha" was approximately $2,000,000.

Answer to Interrogatory 3: The value of the cargo when the steam vessel "City of Omaha" left her first port of departure was approximately $606,475.00.

Answer to Interrogatory 4: The "City of Omaha" was bound on a voyage from Baltimore to Japanese parts via Panama Canal when picked up by the "Cockaponsett."

Answer to Interrogatory 5: The "City of Omaha" had stopped at Balboa on the voyage above referred to, to have repairs made to her stern, and plates which were buckled below the seventeen foot mark; also to have repairs made on electrical telemotor and brick work under boilers; she also stopped at Salina Cruz to repair brick work under her boilers and to repair boiler tubes.

Answer to Interrogatory 6: The "City of Omaha" did suffer damage to her hull in the Panama Canal.

Answer to Interrogatory 7: The "City of Omaha," by reason of needed repairs to her boilers, was unable to make any headway from 3:17 A. M. May 28, 1920, until the "Cockaponsett" arrived

Answer to Interrogatory 8: At the time that the alongside about noon the following day.

"City of Omaha" was prevented from making headway by reason of boiler trouble, she was approximately in latitude 20.50 north and longitude 107.50 west. [20]

Answer to Interrogatory 9: When taken in tow by the "Cockaponsett" the "City of Omaha" was approximately 180 miles offshore.

Answer to Interrogatory 10: The value of the "City of Omaha," when towed into San Pedro by the "Cockaponsett" was approximately $1,920,000.

Answer to Interrogatory 11: The value of the cargo of the "City of Omaha" when she was towed into San Pedro by the "Cockaponsett" was approximately $606,475.00.

Answer to Interrogatory 12: At the time that the "City of Omaha" was taken in tow by the "Cockaponsett" she was approximately in latitude 21.14 north and longitude 107.58 west.

Answer to Interrogatory 13: The defects existing on the "City of Omaha" that *cause* her to seek a tow was boiler trouble.

Answer to Interrogatory 14: The "City of Omaha" had boiler trouble at intervals from the time that she met with accident in the Panama Canal.

WHEREFORE defendant prays that the libelants take nothing by the above-entitled cause, that said libel be dismissed and that defendant recover his costs and charges herein incurred, with such other relief as may be just.

Dated this —— day of August, 1920.

FRANK M. SILVA,
United States Attorney.
E. M. LEONARD,
Asst. United States Attorney.

[Endorsed]: Filed Aug. 14, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [21]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Friday, the fifth day of November, in the year of our Lord one thousand nine hundred and twenty—Present: The Honorable MAURICE T. DOOLING, Judge.

No. 16,871.

R. J. NELSON et al.

vs.

Ves. "CITY OF OMAHA," etc.

Minutes of Court—November 5, 1920—Trial.

This cause came on regularly this day for hearing of the issues joined herein. H. W. Hutton, Esq., was present as proctor for libelant. E. M. Leonard, Esq., Asst. U. S. Atty., was present as proctor for respondent and claimant. Mr. Hutton called A. M. Birchisle and T. P. Deering, each of whom was duly sworn and examined on behalf of libelants, and introduced in evidence copy of log, which was filed

and marked Libelants' Exhibit No. 1, and rested. Mr. Leonard introduced in evidence the deposition of A. C. Norris, and also introduced in evidence as an exhibit certain copies of telegrams, which were filed and marked Respondent's Exhibit "A," and rested. After hearing the respective proctors, the Court ordered that this cause be submitted on briefs to be filed in 10, 10 and 5 days. [22]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY.

Before Hon. M. T. DOOLING, Judge.

R. J. NELSON et al.,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel and Furniture, and Cargo, and UNITED STATES OF AMERICA,

Respondents.

(Transcript of Testimony Taken in Open Court.)

Friday November 5, 1920.

COUNSEL APPEARING:

For the Libelants: H. W. HUTTON, Esq.

For the Respondent: E. M. LEONARD, Esq., Assistant United States Attorney.

Mr. HUTTON.—If your Honor please, this is a

case brought by twenty-seven of the crew of the steamer "Cockaponsett" to obtain an order fixing the total amount of the salvage award and the proportion thereof that the officers and crew were entitled to. There are practically no disputed facts. Briefly, I will state them as follows: The "City of Omaha" was a new vessel; she left the east coast bound for Japan with a cargo on board, and passed through the Panama Canal, and in passing through, by reason of her steering gear not working properly, she ran into one of the abutments there and knocked a hole in [23] her forefoot, which was temporarily patched; that the course properly should have been through the Panama Canal straight to Yokohoma, but they had experienced boiler trouble prior to the time that she passed through the canal, and which increased after she had passed through it, and the master thought it advisable to proceed up the coast, which he did, and got as far as Salina Cruz, Mexico, where it was found necessary to put in for repairs. They spent quite a number of days there repairing the boilers, and then started out again, and after they left the boiler trouble got worse, she ran sometimes and sometimes did not run, until finally she got about 125 miles from Cape Saint Lucas, and then she stopped altogether; she laid there about twenty-four hours, or somewhere in that neighborhood; the vessel was lighted with electric lights, and when the boilers gave out the vessel was in darkness; she steered also by steam, and when the boilers gave out there was no means of steering her, except by hand. The "Cockaponsett" was

bound to San Francisco from the Canal, I think, but that is immaterial, anyway, and received a wireless message advising her of the position and condition of the "City of Omaha," and she went to her assistance and took her in tow, and finally towed her up to San Pedro, and safely delivered her there. She towed her something over 950 miles, occupying approximately 5 days, maybe a little longer. I know they had considerable difficulty in towing, by reason of the fact that they could not steer this vessel except by hand, except one day they managed to get the boilers working again, and then the boilers gave out again, and when they steered her by hand the man who steered was located in the after part of the vessel, and he could not see the towing vessel, and she yawed and went from side to side considerably, and broke one [24] towline, but they did finally safely deliver her.

Now, there are, as I have said, your Honor, very few disputed facts in the matter. The interrogatories attached to the answer, as to the value of the "City of Omaha" at the time of her building, shows she cost $2,000,000, and she was a new vessel, but we are not standing exactly on that, her value as given; her cargo was of the value of $606,475. The value of the "Cockaponsett" is also given, I do not know as that is very material. The interrogatories attached to the answer also give the location of the vessel at latitude 20.50 north, and longitude 107.50 west, at the time she gave out. At the time she was taken in tow her longitude was 21.14 north and longitude 107.58 west.

I desire, if your Honor please, to show what the probable weather conditions were, as I will in a few minutes by an experienced navigator, how far that was from the port of San Blas, and how far it was from the port of Manzanillo, and I will also offer in evidence, if your Honor please, a copy of the log of the "City of Omaha" from March 23d to June 5—June 5 is the date she was delivered in San Pedro. She was picked up on May 27th.

Mr. LEONARD.—That will be admitted, Mr. Hutton, though we might state that is the private memorandum of the master.

Mr. HUTTON.—No, that is the other vessel.

Mr. LEONARD.—I beg your pardon.

Mr. HUTTON.—I will ask to have that marked Libelant's Exhibit 1. I also desire to read in evidence, if your Honor please, from page 192 of a book which is published by the Hydrographic Office, in Washington. It is entitled "H. O. No. 84, Mexico and Central America Pilot, West Coast from [25] The United States to Colombia including the Gulfs of California and Panama, Sixth Edition," Published in the year 1920. On page 190 is a heading "Port San Blas," and on page 192, if your Honor please, under the heading of "San Blas" appears the following: "Seasons, winds.— The southerly winds begin in June and end in November; they are accompanied by much rain, do not blow steadily, are interrupted by frequent squalls from different points of the horizon, and generally wind up with a dangerous and violent storm. As this storm, which is always from between southeastward and southwest-

ward, most commonly happens about the time of the festival of St. Francis, the 5th of October, it has received the local name 'Cordonazo de San Francisco'; but it is sometimes considerably later, and then does the more damage from coming when the danger is no longer apprehended.

"During the dry season the weather is constantly fine. The winds prevail regularly during the day from northwest to west, following the direction of the coast, and are succeeded at night by a light breeze from the land or a calm."

Testimony of A. M. Birchisle, for Libelant.

A. M. BIRCHISLE, called for the libelant, sworn.

Mr. HUTTON.—Q. Where do you reside?

A. I reside in San Francisco.

Q. What is your occupation?

A. I am an officer in the Merchants Marine.

Q. How long have you been such?

A. I have been since 1918.

Q. Have you ever studied navigation?

A. Yes, I passed as a second mate in 1918, in the month of May.

Q. Have you in the last week worked out the distance of a vessel from the port of San Blas and the port of Manzanillo that was [26] lying in the latitude 21.14 north and longitude 107.58 west?

A. Yes, I have.

Q. How far would a vessel in that latitude and that longitude be from San Blas?

A. The distance will be from San Blas to the ship 151.65 miles.

(Testimony of A. M. Birchisle.)

Q. How far would she be from Manzanillo?

A. She would be from Manzanillo 243.7 miles.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. LEONARD.—Q. Did you estimate how far offshore the position of the vessel would be?

A. No, I have not done that.

Q. It would be 151 miles from San Blas, you say?

A. Yes, 151.65 miles from San Blas.

Testimony of Thomas P. Deering, for Libelant.

THOMAS P. DEERING, called for the libelant, sworn.

Mr. HUTTON.—Q. Mr. Deering, you are one of the the Deputy United States Local Inspectors of Hulls in San Francisco, are you not? A. Yes.

Q. How long have you been such?

A. Twenty years I have been local inspector of the District of Alaska, and also local inspector during the interim.

Q. Prior to that you were a master mariner, were you not? A. Yes.

Q. You ran up and down the Mexican Coast for a number of years, did you not? A. Yes.

Q. For how many years?

A. Roughly, I think twenty years.

Q. You have called in at the ports of San Blas and Manzanillo a number of times, did you not?

A. Yes.

Q. Do you remember the steamer "Colima"?

A. Yes. [27]

(Testimony of Thomas P. Deering.)

Q. You sailed on her on one occasion, did you not?

A. Yes.

Q. You were not on her at the time she was lost, were you? A. No.

Q. Do you know about the vicinity that she was lost in?

A. Well, only from what I read in the newspaper. She was lost, as I read, about between Manzanillo and Acapulco; she had left Manzanillo bound for Acapulco.

Mr. LEONARD.—We object to that.

Mr. HUTTON.—Q. What kind of weather are you liable to get off San Blas and Manzanillo, between the early part of June and October?

A. Well, sometimes you have those heavy storms.

Q. When the storms blow there, do they blow very heavy?

A. Sometimes, and sometimes not; if the indications show they are going to blow very heavy, of course you pick up your anchor and get out into the gulf.

Q. Take the case of a steamer that is lying 151 miles off the port of San Blas, 240 miles or thereabouts from Manzanillo on the 27th of May, with her boiler capacity totally gone, no lights on board, hand steering, what would you say as to her condition at that time, would it be good or bad?

A. Well, if she had wireless, and the ship was sound in every other respect, I would not consider her to be in any danger.

Q. Don't you think she would be in danger?

(Testimony of Thomas P. Deering.)

A. I would not consider her so.

Q. Aren't all vessels in some danger when they go to sea? A. Oh, yes, of course.

The COURT.—Q. You mean by that she would be in a condition to call for help? A. Yes.

Q. If help did not come, what would be her condition?

A. At that distance off, she would be in a position to do considerable drifting, and in the meantime send a boat ashore for assistance. [28]

Mr. HUTTON.—Q. Would she be in more danger than if she had her boiler capacity?

A. Naturally, of course.

Q. Then there would be some risk, then, wouldn't there?

A. I do not quite understand you—risk of what?

Q. Risk of something happening to the ship.

A. Well, the boilers out of condition, and no means of making temporary repairs on board, the ship naturally would be handicapped.

Q. If she had boiler trouble for a number of days and finally got so her boilers went out of commission entirely, and she laid twenty-four hours, and there was no apparent method of getting the boilers in order again, do you think that vessel would be in a safe condition?

A. Well, I would not consider her to be in a dangerous condition, exactly.

Q. You would not consider it dangerous?

A. Not a dangerous condition, under those conditions, with the hull sound and wireless on board.

(Testimony of Thomas P. Deering.)

Q. She would not be as safe, anyway, as if she had her boilers? A. Naturally not.

The COURT.—Q. Captain, in your continual reference to wireless, the wireless would simply be a means to bring assistance? A. Yes.

Q. If she could not get assistance, then what would happen?

A. If she could not get assistance?

Q. The question here is a question of salvage, and whether anything or how much should be allowed to a ship that comes to a vessel in that condition and brings her safely to port.

A. Well, of course, your Honor, that is a pointed question; under the conditions, I would not consider the vessel to be in immediate danger, if the hull was sound, and in this vicinity she had a long way to drift.

Q. Before she would go ashore?

A. And even then she had two [29] anchors, and she had a cable of possibly 120 fathoms, so that she could drop them, and unless she had a storm—

Q. (Intg.) In the event she had a storm, then what?

A. I have known vessels to ride out of a typhoon in the Bay of Bengal with two anchors, 120 fathoms on one and 90 fathoms on the other.

Cross-examination.

Mr. LEONARD.—Q. This is about the roadstead, is it not, of vessels, about 150 miles offshore there?

A. No, that is the open ocean.

Q. Well, what I was referring to was this: What

(Testimony of Thomas P. Deering.)

would be the approximate path of coastwise vessels up and down the Coast in that vicinity?

A. The ordinary path, after making Cape San Lucas and passing Cape Corinto would be about ten miles offshore.

Q. About ten miles offshore.

A. Or eight miles.

Q. With reference to the climatic conditions at that point during the season of the year as in May and the first part of June, what, usually, are the conditions there?

A. The conditions are generally fair; of course, as Mr. Hutton has read, these heavy gales come up and give very little warning, very little warning, and in a case like that, if you are in the roadstead at San Blas, you generally stop your cargo and pick up your anchor and get into the gulf, where you have sea room, or at Manzanillo, you do the same.

Q. Do you know as to the number of vessels, more or less, that were traveling north and south on the coast at that time?

A. No, I have not been to sea for over twenty years.

Q. You do not know, approximately, from your experience, in number, what would be the travel there?

A. There is very considerable traffic now at the present date, as I understand. [30]

Redirect Examination.

Mr. HUTTON.—Q. You said that heavy gales are liable to come up there and give very little

(Testimony of Thomas P. Deering.)

warning. Do you think a vessel without any steam power at all is in a very safe position with that in view?

A. Well, you must look at that from the standpoint of a sailing vessel; you have your anchors, and if you are in a sailing vessel when these storms come up you have to get cables out, all you have, and take your chances. Of course, without power, with a steamer, you are handicapped.

Q. What you mean is this, that a vessel in that condition might weather a storm and she might not. Is that correct? A. Yes.

Q. There would be some risk, some considerable danger, attached to the fact that she would be unable to handle herself? A. Without steam?

Q. Yes.

A. Certainly; she could not be a steam vessel without steam, and in a case like that, she would have to depend solely on her anchors.

Q. There would be danger there, would there not?

A. Yes, there is always danger when you are riding through a storm.

Q. Isn't there always danger when a steam vessel is at sea? A. Yes.

Q. Without any means of propelling her?

A. Well, I do not quite get the drift of what you mean. I do not see what you mean by danger.

Q. The risk is increased, is it not, when a steam vessel is at sea without any means of propulsion?

A. Yes, she is certainly handicapped.

Q. There is liability of loss, too, is there not?

(Testimony of Thomas P. Deering.)

A. No, not necessarily, unless by a collision, or something else.

Q. Now, take the case of the "City of Omaha," 151 miles off San Blas, and 240 miles off Manzanillo, without any means of [31] propulsion at all, and no lights, no method of steering by steam, only by hand, and the hand steering-gear being aft, where you could not see a vessel ahead of you, supposing a storm would come up, what would her condition then be? Would it have been safe or unsafe?

A. She would naturally drift; if he had not a drag, he would let his anchors down 45 fathoms and drift, to bring her head on, but as to her having no lights, I do not quite understand that.

Q. The anchors do not always hold, do they, when they are lowered?

A. This is a case where there is no bottom, where they are not lowered to hold; they are lowered for the friction of the water to bring the bow of the vessel to the sea, to make her ride easier; not to anchor her; of course, she could not anchor.

Q. That would not stop her from drifting?

A. It helps materially.

Q. I say, it does not stop her from drifting?

A. It helps to stop her from drifting.

Q. Wouldn't she drift until the anchors caught on the bottom? A. She would drift; yes.

Q. Wouldn't there be some danger of drifting ashore if the wind was on the shore?

A. Well, naturally, in a case like that, the mas-

(Testimony of Thomas P. Deering.)

ter would pay out his cables say to 90 fathoms, and, naturally, the anchors would take hold of the ground in about 80 or 90 fathoms, and tend to hold her; that is what they are for, to hold her in bad weather; it naturally would hold her and bring her bow to the sea. Of course, if the storm was so terrific, would drift ashore, no doubt.

Q. I will ask you, is a vessel at sea without steam power as safe as if she had steam power?

A. No.

Q. There is some risk, then, is there not?

A. Yes. [32]

Recross-examination.

Mr. LEONARD.—Q. Would you state whether or not, in your opinion, a vessel of about 900 tons dead weight, new steel vessel, 150 miles offshore from San Blas, would ride any ordinary storm at that season of the year, from your experience, as it occurred at that particular point?

A. Well, I do not see why she should not.

Q. In your opinion, would she be able to ride out any storm that she might encounter?

A. I would not answer that question.

Q. It is just calling for your opinion. What would your opinion be: Would she ride out the storm, or would she not?

A. I could not give an opinion on that.

Q. Let me put it in this way: Suppose you were captain aboard this vessel, if a storm should arise, would you have any immediate fear of the destruc-

(Testimony of Thomas P. Deering.)

tion of the vessel, a new vessel of 900 tons dead weight?

A. Well, it all depends on the direction of the wind.

Q. The direction of the wind at that season of the year is ordinarily northwest and southeast, is it not —that is, they have one general course, do they not?

A. Yes, in the summer season.

Mr. HUTTON.—Q. Was not the "Colima" lost right in that vicinity?

A. The "Colima" was lost between Manzanillo and Acapulco, according to the papers.

Q. She was lost immediately off Manzanillo in a storm on the 27th of May?

A. Yes, that has been the report in the papers.

Mr. HUTTON.—It is agreed between us that the total wages of the officers and crew of the "City of Omaha" at the time in question were $5,220 a month, the master's wages was $357.50 a month, and the supercargo's wages was $155 a month—I should [33] have said the "Cockaponsett," not the "City of Omaha."

Mr. LEONARD.—If your Honor please, the statement that Mr. Hutton has made I would agree in, with the exception of the lights. I do not think there is any evidence that can be adduced that there were no lights. It will be admitted, of course, that the general supply of steam power was not in the vessel, and she did not have the ordinary equipment of electric lights, but I believe that the emergency lights were available. I will ask to introduce

(Testimony of Thomas P. Deering.)

in evidence the deposition of the master of the "City of Omaha," A. C. Norris, and also eleven aerograms from the "City of Omaha."

I will ask to read in evidence a letter to Williams, Dimond & Co., 310 Sansome Street, San Francisco, Calif., dated June 12, 1920, from Mr. Wagner, master of the steamship "Cockaponsett":

"DIVISION OF OPERATORS.

"San Francisco, California, June 12, 1920.

"Williams, Dimond & Co.,
310 Sansome St.,
San Francisco, Calif.

Gentlemen: I beg to inform you that the wireless operator of the SS. 'Cockaponsett' overheard a conversation between the Navy Boat 'Orion' and the 'City of Omaha' at 10 A. M. of the 29th of May, relative to towing the disabled steamer 'City of Omaha' by the 'Orion' to Magdalena Bay, and have either 'Cockaponsett' or 'Diablo' call at Magdalena Bay and tow her to San Francisco.

I instructed the wireless operator to call up the "City of Omaha' and asked if he required any assistance, and he replied in the affirmative, giving up his position as being in Lat. 21 degrees 27 miles N. 118 degrees .03 Min. W. This position was maintained until 11.45 A. M., and we sighted two steamers [34] heading to the southeast. We again got in touch with 'City of Omaha' by wireless and requested them to make a smoke for identification as he was not in the position given us. Our course was altered southwest heading for a steamer

bearing in that direction as he did not change the bearing I assumed that he was not under control and was disabled. 'City of Omaha' being twelve miles south of the position given.

We arrived alongside and had hawser fast at 12:50 P. M., and then proceeded on our way to San Pedro, Calf., 'City of Omaha' steering wildly at times. Experienced fine weather and smooth sea with brisk northwester to Cape San Lucas. When five miles west of Cape San Lazaro May the 31st, 9:28 P. M., hawser parted; was delayed until 10:34 P. M. same date in getting cable hove on and hawser made fast again; and again proceeded, 'City of Omaha' steering wildly, cutting off Log Rotator of 'Cockaponset's' log line. Engine slowed down four times to allow 'City of Omaha' to change from hand steering to steam and vice versa. Last thirty hours steering entirely by hand on 'City of Omaha.' Arrived off San Pedro Breakwater at 2:45 A. M., June 5th, 1920, laying off and on under slow bell until daylight, master not deeming it safe to enter harbor before daylight in view of the congested condition of said harbor. Cast off towline at 6:30 A. M., anchoring clear of all shipping in several fathoms of water.

Approximate time lost to 'Cockaponset' 2½ days.
Fuel consumption, 2½ days, 550 barrels of oil.
Engine oil consumption, 10 gal.
Provisions consumed, 2½ days.
Crew wages, 2½ days.
Log line and rotator lost.

Sd. N. WAGNER,
Master S.S. 'Cockaponset.'"

[Endorsed]: Filed May 11, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [35]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—(Case No. 16,871).

NELSON,

Libelant,

vs.

"CITY OF OMAHA," etc., and the UNITED STATES OF AMERICA.

Deposition of A. C. Norris, for the Government.

BE IT REMEMBERED, that on Wednesday, August 4th, 1920, at the office of Honorable Francis Krull, in the Postoffice Building, corner of Seventh and Mission Streets, in the city and county of San Francisco, State of California, personally appeared before me FRANCIS KRULL, a United States Commissioner for the Northern District of California, authorized to take acknowledgment of bail and affidavits, etc., A. C. Norris, a witness called on behalf of the United States of America.

E. M. Leonard, Esq., Assistant United States Attorney, appeared as proctor for the United States of America, and H. W. Hutton, Esq., appeared as proctor for the libelant; and said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth,

(Deposition of A. C. Norris.)

in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties appearing, that the deposition of the above-named witness may be taken *de bene esse* on behalf of the United States of America, at the office of Honorable Francis Krull, in the United States Postoffice Building at the corner of Seventh and Mission Streets, in the city and county of San Francisco, on Wednesday, August 4th, 1920, before Francis Krull, a United States Commissioner for the Northern District of California, [36] and in shorthand by Erwin M. Cooper.)

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause, that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived, unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.)

(It is further stipulated that the reading over of the testimony to the witness, and the signing thereof, is hereby expressly waived.)

A. C. NORRIS called for the United States of America, sworn.

Mr. LEONARD.—Q. Your full name, Captain—did you give your initials to the reporter?

A. Yes, I gave him my initials.

(Deposition of A. C. Norris.)

Q. You are the master of the "City of Omaha," are you? A. Yes, sir.

Q. And you were aboard of the vessel during all the times of her maiden voyage from what port?

A. From Baltimore.

Q. And your destination, when you sailed, was—

A. Yokohama and Kobe in Japan.

Q. While, Captain, you kept a note-book, did *you memorandum* of things that occurred, for reference, on board ship? A. Yes, sir.

Q. With reference to her movements?

A. Yes, sir. [37]

Q. And you have submitted that note-book to me?

A. Yes, sir.

Q. To make copies of it.

Mr. HUTTON.—Do you want to put that in?

Mr. LEONARD.—I had better let the captain read it, and we can stipulate—I suppose you will agree if the captain checks on it, but he has not checked on it yet, and we do not want to take the time now.

Q. I wanted to know particularly, Captain, with reference to when the "City of Omaha" called for the assistance of a tow, just in a general way how that occurred.

A. Well, I had just had the wireless operator listen in to see if he could locate the "Cockaponsett."

Q. That was after—

A. After I received instructions from Struthers & Dixon, of San Francisco, stating that the Ship-

(Deposition of A. C. Norris.)

ping Board had elected either the "Cockaponsett" or the "Diablo" to tow the ship to San Francisco.

Q. When you listened in, your operator, as I understand it, located the "Cockaponsett' and signalled her; is that right? A. Yes, sir.

Q. And she came alongside?

A. She came alongside, and took us in tow.

Q. What was the condition of the weather at that time? A. The weather was fine; a light wind.

Q. And your position approximately in miles from the shore at that time was what?

A. I have the latitude and longitude but I don't have the distance exactly.

Q. Could you by referring to the engineer's logbook fix that?

A. I don't think the distance is in there.

Q. Here you are (showing paper to witness). [38]

A. Yes, that was before I stopped.

Q. You are referring now to copy of wireless which you sent to Struthers & Dixon on the 26th day of May? A. Yes, sir.

Q. Beg pardon; I believe you stated the 25th of May, and received the 26th?

A. Yes. You wanted the approximate distance from the shore.

Q. I want you to give me the approximate distance from shore she was at that time.

A. I have not the distance here; I just put down the latitude and longitude, and I have not the distance; I would have to measure it on the chart.

Q. We will pass that. Now, when the "Cockapon-

(Deposition of A. C. Norris.)

sett'' came alongside to give you tow, will you explain how the towing, the passing of the hawser was accomplished?

A. Yes. Well, when he came up close to the ship he just stopped his engines and we put out our work boat and run him a four-inch manila rope, you see, and he took this four-inch manila rope from our work boat, took one end of it, and the other end was bent on to our hawser, you see, our steel wire hawser, and he just hove the steel wire hawser aboard with his steam gear.

Q. What, in addition to the hawser, did you have to make your tow-line?

A. Well, we had the steel wire hawser, and then we had the ship's cable out besides that.

Q. You used the anchor chain of your vessel, did you? A. Yes, sir; and our steel wire hawser.

Q. The towing apparatus was entirely furnished by the ''City of Omaha,'' was it, if I understand you correctly? A. Yes.

Q. And your boat passed the line aboard?

A. Yes, sir.

Q. Now, were there some difficulties in towing? [39]

A. Well, the greatest difficulty was experienced—was, we had no steam to steer by, you see, we had to use our hand gear for steering the ship, and it was situated away in the stern of the ship, away from the bridge, you see, and, of course, the ship did not steer good when she was being towed, as the hand gear, you see—you could not move the helm so quick as you

(Deposition of A. C. Norris.)

could with steam, and it made it a little difficult for him towing her on account of us not having any steam on our ship to steer by.

Q. According to the notes that I have received from you, it seems that the hawser parted on the trip from where you were taken in tow to San Pedro?

A. Yes, sir.

Q. How was the return of the hawser, or the making fast, accomplished in that instance—was it your boat or the "Cockaponsett" boat?

A. It was the "City of Omaha" boat. It was the same procedure that was taken for to get her up on this second occasion.

Q. Your passing of the line to the "Cockaponsett" was accomplished by your crew?

A. Yes, sir. I might state that as his boat was in a very difficult place to launch that it made it quicker work, as the weather was smooth, for us to put our boat, you see. He had his boat, his work boat, inside of his life-boat. That made it so he would have to launch his life-boat first, and then put out his work boat.

Q. It was inconvenient for him to get his work boat out?

A. Yes, sir. It was inconvenient for him to get his work boat out.

Q. Were you spoken by other vessels while you were drifting after your boat became disabled?

A. Yes, sir; while the engines were giving me trouble I was spoken by several. [40]

Q. What was your position with reference to the

(Deposition of A. C. Norris.)

passage of vessels—were you in the path of vessels around at the time?

A. Yes, sir. We were pretty near directly in the path of vessels coming from United States ports to the Canal Zone.

Q. You did not drift out of the course at any time, did you—or did you?

A. Not very much, sir. We were more or less in the track all the time. When we did drift, we were drifting south, but it was was not east or west of the port.

Q. And during all of the time that you were drifting or disabled, what would you say the condition of the weather was?

A. The weather was fine all the time.

Mr. LEONARD.—I presume, Mr. Hutton, that we can stipulate with reference to these wireless telegrams. I really have not had a chance to go through them myself.

Mr. HUTTON.—Certainly.

Mr. LEONARD.—Q. Regarding the injury to the ship, Captain, where did that occur?

A. That occurred in the Panama Canal, sir.

Q. And therefore would have occurred at the time that you had a pilot for the canal, would it?

A. Yes, sir.

Q. As I understand from your notes, you had had difficulty with the telemotor; that, I understand, is a mechanism for directing the propeller, is it?

A. Yes; it is an electric control to the steam-steering gear.

(Deposition of A. C. Norris.)

Q. It is an electric control to the steam-steering gear? A. Yes, sir.

Q. You had had some trouble with that, I understand from your notes, in the canal; and due to that difficulty, she ran aground? A. Yes, sir. [41]

Q. And your survey at San Francisco has developed, I suppose, just about what took place?

A. Yes, sir.

Q. Could you tell us just in a layman's way, so that we will understand, what did take place?

A. Will you allow me to read that off?

Q. What is this that you have Captain?

A. It is just a report about the accident in the canal, you see.

Q. I see. Well, we can get that and use that, if that is what you are going to refer to.

A. Yes, sir. It is really an extension of my protest, you see, but I thought I could read the words off.

Q. If you will tell us so that we can know just about—

A. This was April 11th, when the ship was at the entrance to Gomboa Reach to the Panama Canal, 500 feet north of beacon number eight, the electric telemotor control to the stearing gear failed to operate. Engines were immediately put full speed astern, and the port anchor let go. This failed to stop ship headway sufficiently, and she struck the bank head on, during injury to the shell in the wake of the forepeak. The forepeak was sounded and ship was found to be making water in that compart-

(Deposition of A. C. Norris.)

ment. Vessel proceeded to Balboa assisted by tug, where she arrived at —— P. M. of the same day.

Q. That is as far as we want that report. That denotes how the accident occurred? A. Yes, sir.

Q. You are reading now from the Marine Protest made by you?

A. This is an extension of the protest.

Q. I see. Now, Captain, can you find in this something with reference to what was to be the damage to the vessel by reason of that running aground?

A. Yes, sir. This was at the same—well, this was while we were at Balboa. Surveys were held by surveyors appointed by Lloyd's agents, and after temporary repairs had been made, the vessel [42] was granted a seaworthy certificate to proceed to a United States port for further examination.

Q. What I wanted to get at, Captain, was, what was the nature of the injury to the vessel—was there a buckling of the plates on the bottom, that, I presume, would be disclosed by the examination of the vessel in drydock at San Francisco?

A. Yes. Well, here was April 12th, 7:30 A. M., reported accident to the Shipping Board agent and asked for survey to be held.

Q. Now, you are reading from your notes?

A. Yes.

Q. I have all of that, Captain, A. Yes, sir.

Q. There has nothing been added to that?

A. Yes, sir. There was a diver engaged and he made an examination by going down, you see.

Q. I understand from having read your notes that

(Deposition of A. C. Norris.)

the bottom of the ship was somewhat disturbed by the collision? A. Yes, sir.

Q. And that brickwork under the boilers was also disturbed?

A. No, the brickwork under the boilers was not injured through the force of the accident.

Q. Did you have any trouble with that brickwork before you had the collision?

A. We had some trouble with the boilers coming from Baltimore to Colon.

A. You did? A. Yes, sir.

Q. As I understand from your notes, the brickwork collapsed after you left the canal?

A. Yes, sir.

Q. And you had to put in— A. To Salina Cruz.

Q. To Salina Cruz to rebuild it? A. Yes, sir.

Q. How many boilers did she have?

A. Three boilers.

Q. And there were two of them out of use when you went in there? A. One was out of commission.

Q. One was out of commission?

A. And the other two were [43] in bad shape. We went in there under reduced speed.

Q. Is there anything you could give us telling whether or not it was the collision that caused that or not?

A. Only what I could say verbally, that it really— the collision did not have anything to do with the boilers.

Q. The fact of the matter is that you had trouble with the boilers, and that was part of the trouble that

(Deposition of A. C. Norris.)

put you adrift, was it not—put you out of commission when you were finally towed?

A. Yes, it was the fault of the boilers.

Q. As I notice from your notes, you had been fighting to have your boilers making steam for quite a while even after you arrived at Salina Cruz?

A. Yes, sir.

Cross-examination.

Mr. HUTTON.—Q. Was the forepeak full of water?

A. Yes. After the accident the forepeak filled up right immediately.

Q. Did it remain filled, or did you stop the leak?

A. Well, we had a diver go down and put a soft patch outside, or drive some wedges in first, and made a temporary repair, and then we were able to put the pump on and pump the peak out, and made an inside examination.

Q. How was it on the way up the coast—was the forepeak full of water or not?

A. No, sir. The temporary repairs were made at the canal.

Q. That fixed that?

A. Yes, sir. We filled the ship up with cement where the damage was.

Q. You had trouble with the boilers from Baltimore to Colon?

A. We had slight trouble with them. The ship smoked very badly, and tubes got soaked with soot, and when we opened them up at the canal they were —we had to renew some of the tubes in the starboard boiler. [44]

(Deposition of A. C. Norris.)

Q. What kind of boilers are they? Babcock and Wilcox, or Scott's?

A. They are Foster Marine type of boilers.

Q. After you left Balboa, did you have trouble with the boilers again? A. Yes, sir.

Q. When did it commence?

A. Well, it commenced on the 23d.

Q. Of April?

A. 23d of April. I left Balboa on the 22d, and on the 23d we experienced trouble with one of the boilers.

Q. Ship slow down any? A. Yes, sir.

Q. From what speed to what?

A. She went from about nine knots to about six.

Q. And did the trouble get worse or better, Captain? A. The trouble got worse all the time.

Q. And finally you concluded to put into Salina Cruz? A. Yes, sir.

Q. Was that the first port you called at after Balboa? A. Yes, sir.

Q. How long did you stay in Salina Cruz?

A. Eighteen days.

Q. Repairing the boilers? A. Yes, sir.

Q. Working on them all the time?

A. Practically all the time—well, there was a little time lost; I lost two days before I got into the inner harbor.

Q. You went in for that purpose, to repair the boilers? A. Yes, sir.

Q. After you left Salina Cruz, did you call in at Acapulco? A. No, sir.

(Deposition of A. C. Norris.)

Q. No ports at all. A. No, sir.

Q. What was your voyage, Captain; if nothing had happened to the vessel, would you have called in at San Francisco?

A. No, sir; I was going from Panama or from Balboa down to Honolulu.

Q. And you would have replenished your fuel oil there? A. Yes, sir. [45]

Q. But the trouble with the boilers and the forepeak occasioned your diverting your passage?

A. Yes, sir.

Q. After you left Salina Cruz did you have any trouble with your boiler? A. Yes, sir.

Q. What was your trouble?

A. It was with the brickwork under the boilers and tubes letting go.

Q. Commenced right away?

A. Well, I sailed the 17th, and on the 20th experienced boiler trouble; I mean 17th of May.

Q. How many miles an hour did she make after she left Salina Cruz, when she first left Salina Cruz?

A. How many miles an hour?

Q. An hour.

A. When I left there she made about nine and a half knots after leaving there, and then, when we experienced boiler trouble, she slowed down to six and from six to three knots.

Q. Finally she stopped altogether?

A. Finally she stopped altogether.

Q. What is her normal speed when in good condition? A. About ten knots, ten miles an hour.

(Deposition of A. C. Norris.)

Q. Now, did you go any way close to Acapulco as you passed there? A. No, sir.

Q. You were north of Acapulco and north of Manzanillo when you were picked up?

A. Yes, sir, about 180 miles away from Cape San Lucas; I wouldn't say exact.

Q. Were you south of Cape San Lucas?

A. Yes, sir.

Q. Did you have any bad weather crossing the Gulf of Tehuantepec? No, sir.

Q. Smooth water all the time?

A. Smooth water all the time.

Q. When did she finally stop altogether, Captain?

A. On may 27th, 4:27 A. M., we proceeded ahead on engine, and at 9:00 A. M. she stopped altogether, and then we got her started again at 9:52 the same date—9:52; and then at 12:25 P. M. on [46] the 27th we stopped.

Q. Had you been having those stops all the way from Salina Cruz?

A. Yes, sir; we made several stops.

Q. How many a day did they average?

A. We were stopped—on one occasion we were stopped over twenty-four hours—thirty-one hours.

Q. How long was that before you were picked up, that is, before you finally stopped.

A. That was May 27th she stopped.

Q. Then you had several stops per day at intervals, Captain, until you stopped altogether and could not proceed? A. Yes, sir.

Q. How is the ship lighted or illuminated? I

(Deposition of A. C. Norris.)

mean at night-time how do you light her—with electricity or oil?

A. With electricity when the dynamos are running.

Q. When your steam gave out, how did you make out for light? A. Well, we had oil lamps.

Q. You did finally get so that you could not light the ship by electricity, did you not? A. Yes, sir.

Q. How long did that last?

A. From the 29th of May up to June 5th. There was just one day that we had steam on the ship.

Q. And was that in one of the main boilers, or the donkey boiler? A. It was one of the main boilers.

Q. Can you operate the dynamos from the donkey boilers?

A. We had no donkey boiler; we just had the three main boilers.

Q. When you have no steam, Captain, you cannot steer the ship by steam, of course? A. No, sir.

Q. Did you have to steer by hand all the way up the coast after you were picked up?

A. Yes, sir, just with the exception of one day, we had steam on the boilers.

Q. Did that boiler give out again?

A. It gave out again; yes, sir. [47]

Q. The difference between steering by steam and hand is that by hand you have a block and fall attachment to a wheel?

A. We have a screw-worm attached to the quadrant.

Q. It is much slower than the other?

(Deposition of A. C. Norris.)

A. It is much slower than the steam. It was a very difficult place where it was situated. It was away in under the poop-deck, and there was no means of seeing the other ship.

Q. You cannot see ahead?

A. No, sir. We used the voice tube from the bridge.

Q. When you came up the coast after passing Cape San Lucas, did you go inside of those three islands that are down there or outside?

A. We went inside.

Q. Had any wind at all?

A. There was a little wind one day in the afternoon from the north.

Q. Does it ever blow down between Cape San Lucas and Manzanillo?

A. Oh, yes, sir. We get some very bad storms sometimes in the year, generally in the winter season.

Q. Was not the steamer "Colima" lost right in that vicinity—are you familiar with that?

A. No, sir; I am not very familiar with that coast, but the sailing directions, they mentioned about the storms on the coast, in fact, all along the Mexican coast in the winter season.

Q. They blow out of the Gulf of California, don't they? A. Yes, sir.

Q. And you were practically at the mouth of the Gulf of California? A. Yes, sir.

Q. Do you know whether you *were* or not you were to the north or south of Cape San Blas?

A. I can't just recollect where San Blas is located now.

(Deposition of A. C. Norris.)

Q. That is north of Manzanillo and south of Mazatlan; you were offshore? [48]

A. You see, when the engines finally stopped altogether, I was steering across on an angle for Cape San Lucus, so I was well offshore, clear of the coast. I had left the Mexican coast down below before I got to the Gulf of California. I had left the Mexican Coast and steered right across for the extreme end of the Peninsula there, Cape San Lucas.

Q. How many days were you stopped when the "Cockaponsett" picked you up?

A. She was stopped from the 27th to the 29th; forty-eight hours.

A. You had no steam at all during that time?

A. No, sir—well, I did make a little; they tried the engines out, and they did not run an hour; not much more than half an hour, and then they stopped again; it was hard to work.

Q. What was the trouble with the boilers, Captain, do you know?

A. Well, of course, they were these water tube boilers, and I think there was some neglect attached to it.

Q. Water tube boilers are quite a common type nowadays; other ships seem to get along.

A. Of course, there was a licensed man there handling the boilers, and I am not in a position to say what did happen then.

Q. Of course, you are not an engineer?

A. But my opinion is that part of the trouble was due to neglect, perhaps allowing salt water into the boilers.

(Deposition of A. C. Norris.)

Q. How many days was it, Captain, from the time that you left Balboa to the time you arrived in San Pedro?

A. I left Balboa the 22d day of April; that would be eight days in April, and then I was all May; that is thirty-one, and five days in June—forty-four days.

Q. The average passage for a ship like that would be ten to twelve days, would it not? [49]

A. Yes, sir—oh, less than that; I think to San Pedro—it would be about ten days to—eleven days to San Francisco; about nine days, I should say.

Q. How many miles did the "Cockaponsett" tow you? A. 952 miles.

Q. How many days did it take you?

A. It took—well, pretty near six days—over five and a half days.

Q. Expecting to go out again, Captain, expecting the ship "City of Omaha" to leave San Mrancisco again?

A. Yes, sir, I will be leaving to-morrow afternoon.

Q. Going to continue her voyage? A. Yes, sir.

Q. The same cargo on board?

A. Yes, sir, the same cargo.

Q. Have you been under repairs in San Francisco all the time?

A. Yes, sir. When I arrived here they took half of the cargo out of the ship and she went on the drydock and she made repairs to the hull, and she came off drydock and the cargo was reloaded, and now the repairs on the engines and boilers are being completed.

(Deposition of A. C. Norris.)

Q. Where were the repairs made—Union Iron Works?

A. Yes, sir; the Union Iron Works done the repairs.

Q. Do you know how many steamers go up and down the coast, Captain, per month.

Q. No sir, I do not; I am not very familiar with this coast.

Q. Were you in wireless communication with any other steamers but the "Diablo" and the "Cockaponsett"?

A. Yes, sir, there were two steamers spoke me, wanted to know if I wanted assistance.

Q, Were they bound south or bound north?

A. They were both bound south.

Q. So, if you had got assistance from them, they would have had to give up that trip and tow you; they would have to proceed north again?

A. Yes, sir. [50]

Q. Do you remember what steamers they were?

A. Well, one was the "Melville Dollar" and the other was a Shipping Board ship; I have forgotten her name now.

Q. How far away was the "Cockaponsett when you first got in wireless communication with her?

A. Why she was about, I should say, about twenty miles away.

Q. And the other one, the "Diablo," where was she?

A. Well, I never got into communication with him until I was part way towed from this position, you see, to San Pedro.

(Deposition of A. C. Norris.)

Q. Then, up to the time you were taken in tow, you were only in communication with three vessels, Captain; is that correct—that is, the "Melville Dollar" and the Shipping Board Ship and the "Cockaponsett"?

A. Yes, sir. Then there was a Norwegian ship, the "Senator," I think it was the "Senator"; he spoke me just before the "Cockaponsett" picked me up; he was bound south also.

Q. How many fathoms of towing apparatus did you have out?

A. Well, first I had ninety fathoms of steel wire hawser, and then I had forty-five fathoms of cable, ship's anchor chains, and then when the hawser parted the second time, I gave him a hundred and twenty fathoms of another steel wire hawser, and I gave him sixty fathoms of chain.

Q. That made the towing easier? A. Yes, sir.

Mr. HUTTON.—I think that is all, Captain.

Mr. LEONARD.—That is all. [51]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of notice and stipulation of the proctors for the respective parties, on Wednesday, August 4th, 1920, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at my office in the building known as the United States Postoffice Building, corner of Seventh and Mission Streets, in the city and county of San Francisco,

State of California, personally appeared A. C. Norris, a witness called on behalf of the United States of America, in the cause entitled in the caption hereof; and E. M. Leonard, Esq., Assistant United States District Attorney, appeared as proctor for the United States of America, and H. W. Hutton, Esq., appeared as proctor for the libelant; and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand by Erwin M. Cooper, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness, and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken. [52]

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid, this 9th day of August, 1920.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco, California.

[Endorsed]: Filed Nov. 5, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [53]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON et al.,

Libelants,

vs.

"CITY OF OMAHA," etc., and UNITED STATES OF AMERICA et al.

Respondents.

(Opinion.)

H. W. HUTTON, Esq., Proctor for Libelants.

FRANK M. SILVA, Esq., United States Attorney, and E. M. LEONARD Esq., Assistant United States Attorney, Attorneys for Respondents.

Considering the value of the salved and salving vessels, the distance traveled and the weather conditions prevailing, an award equal to two months' pay for each libelant will in my judgment be just. A decree will be entered accordingly.

February 18th, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 18, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—(No. 16,871).

R. J. NELSON et al.,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, and Boilers, Tackle, Apparel and Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

(Decree.)

This cause having been brought on to be heard on the pleadings and proofs and the arguments and briefs of the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now, therefore, by reason of the matters set forth in the pleadings and shown by the proofs herein, it is ORDERED, ADJUDGED AND DECREED, and this does ORDER, ADJUDGE and DECREE, that libelants have and recover from the steam ves-

sel "City of Omaha," her engines and boilers, tackle, apparel and furniture, and her cargo, and the United States of America, and that the United States of America pay to the libelants or to H. W. Hutton, Esquire, their proctor for them, for salvage services rendered by said libelants to the said steam vessel "City of Omaha," her said engines and boilers, tackle, apparel and furniture and cargo, the same being in amount two months' pay to each of the libelants, the following sums respectively:

To libelant R. J. Nelson, the sum of one hundred and eighty ($180.00) dollars.

To M. Burns, the sum of four hundred and fifty-six and 50/100 ($456.50) dollars.

To James Allen, the sum of four hundred ($400.00) dollars.

To R. W. Kelly, the sum of three hundred and fifty-two and 50/100 ($352.50) dollars. [55]

To C. Vanderley, the sum of two hundred and ten ($210.00) dollars.

To G. Swanson, the sum of one hundred and ninety ($190.00) dollars.

To C. B. Petterson, the sum of one hundred and eighty ($180.00) dollars.

To K. H. Niemi, the sum of one hundred and eighty ($180.00) dollars.

To Peter Emmers, the sum of one hundred and eighty ($180.00) dollars.

To S. Johanssen, the sum of one hundred and eighty ($180.00) dollars.

To Andries van Roon, the sum of one hundred and eighty ($180.00) dollars.

To Lenhart Saarnie, the sum of one hundred and eighty ($180.00) dollars.

To F. Jorgensen, the sum of one hundred and eighty ($180.00) dollars.

To L. R. Drake, the sum of one hundred and thirty ($130.00) dollars.

To A. A. Krutmeyer, the sum of two hundred and ten ($210.00) dollars.

To John R. Whalen, the sum of one hundred and eighty ($180.00) dollars.

To V. J. Ricardo, the sum of one hundred and eighty ($180.00) dollars.

To C. J. Sullivan, the sum of one hundred and eighty ($180.00) dollars.

To J. E. Gough, the sum of one hundred and eighty ($180.00) dollars.

To A. H. Lake, the sum of one hundred and eighty ($180.00) dollars.

To P. S. Murray, the sum of one hundred and eighty ($180.00) dollars.

To E. J. Farrell, the sum of one hundred and eighty ($180.00) dollars. [56]

To R. Schulz, the sum of one hundred and eighty ($180.00) dollars.

To Patrick O'Mara, the sum of one hundred and eighty ($180.00) dollars.

To S. H. Hinrichi, the sum of one hundred and eighty ($180.00) dollars.

To D. L. Heywood, the sum of one hundred and eighty ($180.00) dollars.

And to James Moore, the sum of one hundred and eighty dollars, all libelants as aforesaid, and all

with their costs to be taxed, and interest from the date of this decree.

It is FURTHER ORDERED, ADJUDGED AND DECREED, that upon the making payment of the above amounts to said H. W. Hutton, proctor for said libelants, this judgment and decree be adjudged to have been satisfied and paid to the libelants above mentioned.

Dated March 1st, 1921.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Mar. 1, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON et al.,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," etc., and the UNITED STATES OF AMERICA,

Defendants.

(Stipulation Re Modification of Decree.)

It is hereby stipulated, that the decree herein reads, "To L. R. Drake, the sum of one hundred and thirty ($130.00) dollars," and not one hundred and eighty ($180.00) dollars.

That on the third day of March, 1921, at the hour of ten o'clock in the forenoon, defendants moved the above court to modify the decree herein by striking out the words "the steam vessel 'City of Omaha,' her engines and boilers, tackle, apparel and furniture and her cargo," and between the words "have and recover" and the words "the United States of America" on the first page of said decree, so that said decree should read "have and recover from the United States of America," alone, that counsel for libelants was present and resisted said motion, but said motion was granted by the Court.

This stipulation is made to show that such action was taken by the Court, as there does not appear to be any record thereof.

Dated March 21st, 1921.

H. W. HUTTON,
Proctor for Libelants.

FRANK M. SILVA,
U. S. Attorney.

FREDERICK MILVERTON,
Special Asst. U. S. Atty. in Admiralty,
Proctor for United States of America.

[Endorsed]: Filed Mar. 22, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [58]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—(No. 16,871).

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULTZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

Notice of Appeal.

To the Libelants Above Named, and to H. W. Hutton, Esq., Their Proctor:

You and each of you are hereby notified that the United States of America, respondent above named, intends to and hereby does appeal from the decision and final decree made and entered in the

above-entitled court and cause on the 1st day of March, 1921, as amended on the 3d day of March, 1921, to the United States Circuit Court of Appeals for the Ninth Circuit, and, in accordance with the practice and procedure in admiralty, intends to and will make application for leave of the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit, to take new proofs before said court in support of the allegations and facts set forth and contained in the several paragraphs of the said respondent's answer filed in said suit.

Dated at San Francisco, California, this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondent United States of America.

[59]

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [60]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

Petition for Appeal.

The above-named respondent, the United States of America, conceiving itself aggrieved by the final decree made and entered in the above-entitled cause on the 1st day of March, 1921, as amended on the 3d day of March, 1921, wherein and whereby it was ORDERED, ADJUDGED AND DECREED that

the libelants above named have and recover against the said United States of America, two months' pay to each of said libelants for salvage services rendered by them to the S. S. "City of Omaha," together with costs and interest from the date of said judgment, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said decree, for the reasons set forth in the assignment of errors filed herewith, and said respondent prays that its petition herein for its said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [61]

Dated at San Francisco, California, this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondent United States of America.

Order Allowing Appeal.

Upon the foregoing petition of the United States of America, respondent above named, praying for the allowance of an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, it appearing to the Court that said respondent has duly filed its assignment of errors as required by law, and the rules of said United States Circuit Court of Appeals for the Ninth Circuit; now, therefore,

IT IS HEREBY ORDERED that the said appeal be and the same is hereby allowed as prayed for.

Dated at San Francisco, California, this 14th day of April, 1921.

W. H. HUNT,
Judge of said United States Circuit Court.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [62]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Assignment of Errors.

Now comes the United States of America, one of the respondents above named, and says:

That in the record of proceedings in the above-entitled cause there is manifest error, and said respondent now makes, files and presents the following assignment of errors upon which it will rely upon the appeal of said cause, to the Circuit Court of Appeals for the Ninth Judicial Circuit, as follows, to wit:

1. The Court erred in awarding to the said libelants or to any of them any amount whatsoever for alleged salvage services to the said S. S. "City of Omaha."

2. The Court erred in awarding to the said libelants and to each of them two months' pay for salvage services alleged to have been rendered by them to the said steam vessel "City of Omaha," and in awarding to said libelants and to each of them any amount in excess of one month's pay to each of them as compensation for said alleged salvage services. [63]

3. The Court erred in failing to render a decision and order judgment entered in favor of the said respondent, the United States of America, dismissing the libel of said libelants filed in said cause.

4. The Court erred in awarding to the said libelants and to each of them any amount whatsoever, for the reason that said libelants were at the time of the alleged salvage services members of the crew of a vessel belonging to the United States of

America, and rendered salvage services, if any, to a vessel likewise belonging to the said United States of America, by reason thereof it became the duty of the said libelants and each of them to render said services without compensation beyond their wages as seamen on said United States vessel.

Dated at San Francisco, California, this 14th day of April, 1921.

FRANK M. SILVA,
United States Attorney,
FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Respondent United States of America.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [64]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FAR-

RELL, R. SCHULZE, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle. Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

Supersedeas.

The United States of America, one of the respondents above named, having duly given notice of appeal from the decision and final decree in the above-entitled cause entered on the 1st day of March, 1921, as amended on the 3d day of March, 1921, and having duly filed its assignment of errors upon said appeal,—

IT IS HEREBY ORDERED that said decision and decree be and the same is hereby superseded and all proceedings thereunder stayed.

April 14, 1921.

W. H. HUNT,
Judge of the Above-entitled Court.

[Endorsed]: Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [65]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON, et al.,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

Stipulation (and Order that Original Exhibits be Transmitted to U. S. Circuit Court of Appeals).

It is hereby stipulated by and between the parties above named that upon the appeal of the above-named respondents in the above-entitled cause there may be transmitted to the clerk of the Circuit Court of Appeals for the Ninth Circuit all the exhibits filed in said cause in their original form.

Dated this 15th day of April, 1921.

H. W. HUTTON,
Proctor for Libelants.

FRANK M. SILVA,
United States Attorney.

FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty.

It is so ordered.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: Filed Apr. 18, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [66]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 66 pages, numbered from 1 to 66, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of R. J. Nelson et al. vs. the Steam Vessel "City of Omaha," etc., No. 16871, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein,) and the instructions of the proctor for respondent and appellant.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Twenty-five Dollars and Seventy-five Cents ($25.75), and that the same will be charged against the United States in my quarterly report for the quarter ending June 30th, 1921.

Annexed hereto is the original Citation on Appeal, issued herein (page 68).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of May, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [67]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,871.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES van ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,

Libelants,

vs.

Steam Vessel "CITY OF OMAHA," Her Engines, Boilers, Tackle, Apparel, Furniture and Cargo, and the UNITED STATES OF AMERICA,

Respondents.

Citation.

United States of America,
Northern District of California,—ss.

The President of the United States of America, to the Libelants Above Named, GREETING:

You and each of you are hereby cited and admonished to be and appear before the United States

Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the Southern Division of the District Court of the United States in and for the Northern District of California, in the above-entitled proceeding, wherein the above-named United States of America is respondent and you are the respective libelants, to show cause, if any there be, why the decree entered in the above-entitled proceeding on the 1st day of March, 1921, as amended on the 3d day of March, 1921, in said appeal mentioned, and thereby appealed from, [68] should not be corrected and reversed, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable W. H. HUNT, Judge of the District Court in and for the Southern Division of the District Court of the United States in and for the Northern District of California, at the city of San Francisco, State of California, this 14th day of April, 1921.

W. H. HUNT,
United States Circuit Judge.

Service of a copy of the within citation, and of notice of appeal, petition on appeal, order allowing appeal, assignment of errors, and order of supersedeas, in the above-entitled cause, are hereby admitted this 14th day of April, 1921.

G. W. HUTTON,
Proctor for Libelants. [69]

[Endorsed]: No. 16,871. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. In Admiralty. R. J. Nelson et al., Libelants, vs. Steam Vessel "City of Omaha," etc., and the United States of America, Respondents. Citation. Filed Apr. 15, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [70]

[Endorsed]: No. 3687. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. R. J. Nelson, M. Burns, Jas. Allen, R. W. Kelly, C. Vanderley, G. Swanson, C. B. Petterson, K. H. Niemi, Peter Emmers, S. Johannsen, Andries van Roon, Lenhart Saarnia, L. R. Drake, F. Jorgensen, A. A. Krutmeyer, John R. Whalen, V. J. Risardo, C. J. Sullivan, J. E. Gough, A. H. Lake, P. S. Murray, E. J. Farrell, R. Schulz, S. H. Hinrichi, D. L. Heywood, James Moore and Patrick O'Mara, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Libelants' Exhibit No. 1.

S. S. OMAHA.

March 23rd, 1920.

Joined the Green Star Steamship Corp. and was appointed Master of the S. S. City of Omaha.

March 24th, 1920.

1:00 A. M. left New York on the B. & O. train for Baltimore. Noon, went on board the S. S. City of Omaha and relieved Capt. Mathews.

Thursday, March 25th, 1920.

Maryland day at Baltimore. No cargo being loaded.

Friday, March 26th.

7:00 A. M. Resumed work loading cargo at all hatches.

2:00 P. M. Started signing on crew. Paid port wages.

6:00 P. M. Stopped work loading.

Saturday, March 27th.

7:00 A. M. Resumed work loading cargo at all hatches. Noon, stopped work for the day.

Sunday, March 28th.

No work going on.

Monday, March 29th.

Resumed work loading cargo at all hatches at 7:00 A. M.

6:00 P. M. Stopped work.

Tuesday, March 30th.

7:00 A. M. Resumed work loading cargo at 1, 2, 4 and 5 hatches.

6:00 P. M. Stopped work.

Wednesday, March 31st.

7:30 A. M. Resumed work loading cargo at 1, 2, 4 and 5 hatches.

6:00 P. M. Stopped for supper.

7:00 P. M. Resumed work at No. 2 hatch.

11:00 P. M. Stopped work.

Thursday, April 1st.

7:30 A. M. Resumed work loading cargo at 1, 2, and 4 hatches.

No. 1 and 4 hatches closed at 3:00 P. M.

11:00 P. M. Finished loading all cargo. Closed hatches.

Friday, April 2nd.

8:00 A. M. Thick fog, unable to leave the dock.

Draft of ship sailing 26–00. For 27–8 off from dock and proceeded on voyage weather still a little foggy.

4:00 P. M. Started adjusting compass.

5:00 P. M. Finished adjusting.

Saturday, April 3rd.

2:37 A. M. Reversed engines from full speed ahead to full speed astern for trial, ships way stopped in 3′–15″.

3:45 A. M. Slowed down. 3:50 A. M. Stopped 4:00 A. M. Took Norfolk pilot on board and proceeded to Old Point Comfort to land trial board.

5:40 A. M. Anchored in Hampton Roads and landed trial board. Remained at anchor to make engine repairs.

9:50 A. M. Engine repairs completed.

10:00 A. M. Hove up anchor and proceeded from Hampton Roads to sea.

11:40 A. M. Stopped and discharged pilot and proceeded on voyage. Noon, passing Cape Henry.

11:20 P. M. Diamond Shoal Lightship abeam distance 8 miles.

Saturday, April 10th.

9:10 P. M. Stopped off Colon and took pilot on board, also Doctor and canal officials.

10:20 P. M. Made fast alongside pier 16 at Colon to take on board fuel oil.

Draught 25′–3′ for 26–0 Aft.

Midnight started taking in fuel oil.

Capt. A. C. NORRIS—C/o STRUTHERS & DIXON, 343 Sansome St., San Francisco.

EXCERPTS FROM LOG-BOOK OF S. S. OMAHA.

Sunday, April 11th.

9:35 A. M. Finished taking fuel oil, received on board approximately 450 tons.

10:00 A. M. Cast off from dock and proceeded towards Blaboa.

11:25 A. M. Entering Gatun Lock.

12:23 P. M. Clearing Gatun Lock.

1:35 P. M. Experienced difficulty with electric telemoter control. Let go anchor to keep ship in channel.

2:40 P. M. Steering gear working properly, hove up anchor and proceeded.

4:00 P. M. The electric telemotor control to steering gear failed to operate, ship being at the entrance to Bomboa.

Reach 500 ft. north of beacon #28. The engines were immediately put full speed astern and the port

anchor let go but this failed to stop ships headway sufficiently, and she struck bank head on doing injury to the shell in wake of forepeak, the peak was immediately sounded and ship was found to be making water in that compartment very fast.

4:45 P. M. Steering gear working properly proceeded toward Balboa assisted by a tow-boat.

6:44 P. M. Entering Pedro Miguel Locks.

7:10 P. M. Clearing Pedro Miguel Locks.

7:48 P. M. Entering Miaflores Locks.

8:32 P. M. Leaving Miaflores Locks.

9:30 P. M. Arrived at dock at Balboa and made fast alongside S. S. Mulpua.

10:10 P. M. All fast, pilot left ship.

Engaged a shore watchman. Draught on arrival 29.07 for 25.11 aft.

S. S. CITY OF OMAHA AT BALBOA CANAL ZONE.

Monday, April 12th.

7:30 A. M. Reported accident to shipping board agents, and asked for a survey to be held. Employed diver to examine damage. Lloyds Surveyors came on board and made an examination of ship and took divers report.

2:00 P. M. Noted protest.

3:00 P. M. Received report from Lloyds surveyors to the effect that permanent repairs would have to be made. On asking them to modify this and allow a diver to go down and plug holes so peak could be pumped out and an examination made from the inside they agreed. At same time repairs on boilers and steering gear are being carried out.

Tuesday, April 13th.

7:00 A. M. Diver went down and plugged holes in bow.

Now began pumping out forepeak.

6:00 P. M. Water well out of peak.

Repairs on boilers and steering gear being carried out.

Wednesday, April 14th.

8:00 A. M. Lloyds surveyors came on board and made a survey of damage of bow, from inside of forepeak. Also peak was examined by Mast Master and 1st Officer. On their report being received it stated that ship could make temporary repairs and proceed to a United States Port for further examination.

Awaiting instructions from New York.

Thursday, April 15th.

7:00 A. M. Resumed work on boilers and steering gear.

Waiting on instructions from New York about temporary repairs.

Friday, April 16th.

7:00 A. M. Resumed work on boilers and steering gear.

Waiting on instructions from New York about temporary repairs.

Saturday, April 17th.

8:00 A. M. Resumed work on boilers and steering gear.

Shipping Board received instructions from New York to make temporary repairs to damaged part of ship.

5:30 P. M. Shifted ship alongside of dock ahead of S. S. Mulpua.

7:00 P. M. All fast.

Continued repairs until midnight.

Sunday, April 18th.

7:00 A. M. Resumed work on repairs to damaged bow also at work on boiler repairs. Continued repairs on bow damage until midnight.

Monday, April 19th.

7:00 A. M. Resumed work on repairs to damaged bow. Noon, completed repairs on damaged bow.

2:00 P. M. Lloyds Surveyor made an examination of repairs on damaged bow and recommended more cement to be put around damaged port. Repairs on boilers going on through the day.

Tuesday, April 20th.

8:00 A. M. Resumed work on damaged bow. Electricians overhauled electric telemotor.

1:00 P. M. Surveyor on board but work not completed.

8:00 A. M. Resumed work on damaged bow. Repairs on boilers going on through the day.

Wednesday, April 21st.

Boiler repairs resumed and electric telemotor being overhauled.

1:00 P. M. Lloyds Surveyor made examination of damaged bow and recommended a little more work to be done on damaged port. This work was started at once and completed at 10:15 P. M. Boiler work completed at noon.

Midnight, steering gear in working order.

Thursday, April 22nd.

9:00 A. M. Received instructions through agents from Green Star Line to proceed to San Francisco. Received all ships documents including Surveyor's reports.

11:15 A. M. Pilot on board.

11:30 A. M. Cast off from dock and proceeded to sea.

Draft 26–6 for 26–9 aft.

12:40 P. M. Pilot left ship. Proceeded on the way to San Francisco.

Friday, April 23rd.

Brick wall of port boiler collapsed. Boiler was cut out and after cooling was rebuilt.

Saturday, April 24th.

Center boiler gave out. Ship was stopped 8 hours to make repairs.

Tuesday, April 27th.

Center boiler gave out again. Noon, ship was headed for Salina Cruz.

Thursday, April 29th.

1:30 P. M. Arrived at Salina Cruz, and anchored in roads.

Friday, April 30th.

8:00 A. M. Got underway and started to enter inner harbour. Eccentric rod of steam steering gear broke. Came to anchor again and had same repaired.

Saturday, May 1st.

8:00 A. M. Got underway and came into inner harbor Salina Cruz without any accident.

9:00 A. M. Made fast to wharf. Draft. 25–6 for 26–00 Aft.

May 1st to May 17th.

Alongside of wharf making repairs to boilers.

May 17th.

10:50 A. M. Cast off from wharf and shifted ship out of inner harbor, to Salina Cruz roads. Noon, came to anchor in roads, waiting for ships papers.

6:00 P. M. Hove up anchor and proceeded on the way to San Francisco.

Draft sailing. 25–6 for 26–08 Aft.

May 18th.

Ship stopped from 1:15 A. M. to 2:00 A. M. making engine repairs.

May 20th.

5:55 P. M. Stopped ship to make engine and boiler repairs.

May 21st.

Ship stopped making repairs to engines and boilers.

May 22nd.

4:58 A. M. Proceeded ahead on engines.

May 23rd.

7:04 A. M. Stopped engines for boiler repairs.

11:05 P. M. Proceeded ahead on engines.

May 24th.

7:15 P. M. to 8:37 P. M. engines stopped for boiler repairs.

May 25th.

6:17 A. M. Stopped engines for boiler repairs.

May 26th.

Engines stopped for repairs to boilers.

3:05 P. M. Proceeded ahead on engines.

8:50 P. M. Stopped engines for boiler repairs.

May 27th.

4:27 A. M. Proceeded ahead on engines.

9:13 A. M. Stopped for repairs to boilers.

9:52 A. M. Proceeded ahead on engines.

12:25 P. M. Stopped engines for boiler repairs.

May 28th.

2:49 A. M. Proceeded ahead on engines.

3:17 A. M. Stopped boiler trouble.

May 29th.

Noon, S. S. Cockaponset arrived at position where S. S. City of Omaha was located and took ship in tow. Position 21–14 N. 107–58 W.

All boilers out of commission, steering ship by hand gear aft.

May 30th.

Ship being towed by S. S. Cockaponset. All boilers out of commission ship being steered by hand gear aft.

May 31st.

Ship being towed by S. S. Cockaponset.

8:00 P. M. Got enough steam on one boiler to run dynamo and steer ship.

9:00 P. M. Slowed down to change gears from hand to steam and when going ahead again hawser parted at stern chock of S. S. Cockaponset.

Hove in cable and broken hawser and made fast again to S. S. Cockaponset, with other towing nawser.

P. M. Proceeded ahead with tow. Ship steering with steam gear controlled by electric telemotor.

June 1st.

Ship being towed by S. S. Cockaponset, everything going along nicely.

Steering ship by steam controlled by electric telemotor, making about 6½ knots.

June 2nd.

6:00 A. M. Boiler gave out had to put ship in hand steering gear again.

Ship being towed by the S. S. Cockaponset. Making 6 knots.

June 3rd.

No steam on ship, steering by hand gear. Ship being towed by the S. S. Cockaponset. Making 6 knots.

June 4th.

Ship being towed by S. S. Cockaponset, making 6½ knots.

No steam on ship, steering by hand gear aft.

June 5th.

3:15 A. M. Arrived in San Pedro Roads under tow of S. S. Cockaponset.

5:25 A. M. Came to anchor in San Pedro outer harbour.

8:30 A. M. Received visit from doctor. Waiting all day for instructions from agent as to the future movements of the steamer.

Draft on arrival of 25:00 for 25:40 aft.

Sunday, June 6th.

At anchor in San Pedro roads waiting for orders from San Francisco.

Monday, June 7th.

Still at anchor in San Pedro roads waiting for orders.

Tuesday, June 8th.

At anchor in San Pedro roads.

2:00 P. M. Local Inspectors, surveyors and Shipping Board officials came on board and made an examination of boilers etc., and decided ship would make repairs on one boiler and tow to San Francisco for permanent repairs.

Wednesday, June 9th.

11:30 A. M. Shore gang came on board and started repairs on boilers.

1:00 P. M. Tow boat came off and supplied ship with steam. Hove up anchor and started to enter the port of San Pedro. Tow boat and power boat could not handle ship. Had to call for help from navy, who came to our assistance.

5:00 P. M. Arrived at dock and made fast. Shore gang working through the night at repairs on boiler.

Thursday, June 10th.

Repairs of boilers going on through the day and night.

Friday, June 11th.

Ship at Kiskhoff Lumber *whard* making repairs to boilers.

Saturday, June 12th.

Similar work going on through the day and night.

Sunday, June 13th.

11:00 A. M. Surveyors came on board to survey repairs done on boilers and decided to leave the boiler

with light fire through the day and part of the night and sail ship Monday morning.

Monday, June 14th.

7:00 A. M. Surveyors on board passed boiler and steering gear and ship left wharf assisted by tow boats and power boats. Proceeded out to roads to meet S. S. Devolente who was going to tow Omaha to San Francisco, after arriving in roads could not keep steam on boiler so came to anchor. Got in communication with shore and surveyors and shipping board men came on board to discover what was wrong. Got tow boat off to ship to supply steam and got a good head of steam up on boiler and blew the tubes and ship held her steam O. K.

9:20 P. M. Gave S. S. Devolante hawser.

10:30 P. M. Proceeded. 11:10 P. M. hawser carried away.

[Endorsed]: United States District Court. No. 16,871. Nelson vs. Omaha. Lib. Exhibit 1. Filed Nov. 5, 1920. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3687. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 13, 1921. F. D. Monckton, Clerk.

Respondent's Exhibit "A."

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

CITY OF OMAHA 1439 MILES FROM SAN FRANCISCO NOON TODAY EXPERIENCING BOTH ENGINE AND BOILER TROUBLE

ENGINE TROUBLE REPAIRED TUBES IN STARBOARD AND PORT BOILER GIVING OUT WHEN NOT STOPPED MAKING ABOUT SIX KNOTS CONDITIONS MAY GET WORSE CONSIDER NO USE TRYING MAKE OTHER MEXICAN PORTS PLEASE ADVISE PROMPTLY WHAT YOU RECOMMEND IN CASE BOILERS FAIL ALTOGETHER.

Above wire sent to Green Star S. S. Corporation by Master of City of Omaha on May 23rd.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

D 53 SF M 102 GOVT. WU

(Received SF 5–26–20)

RADIO VIA YB SF.

CITY OF OMAHA—May 25, 1920.

Struthers & Dixon, Inc.,
343 Sansome Street,
San Francisco, California.

CITY OF OHAMA.

CITY OF OMAHA NOON POSITION THIS DATE LATITUDE TWENTY FIFTY NORTH LONGITUDE ONE HUMDRED SEVEN FIFTY WEST THIRTEEN HUNDRED TEN MILES FROM FRISCO TUBES IN ALL BOILERS LETTING GO HAVE TO STOP AND PLUG SAME FREQUENTLY MAKING VERY POOR HEADWAY SITUATION SEEMS TO BE GETTING WORSE HAVE YOU ANY SUGGESTIONS TO MAKE PLEASE REPLY PROMPTLY FOLLOWING MESSAGE SENT TO USS THORTON AT EIGHT FIFTEEN PM SAME

DATE QUOTE WE ARE STOPPED NOW TRYING TO PLUG TUBES IN BOILERS EXPECT TO PROCEED AHEAD EARLY TOMORROW THINK WE CAN REACH MAGDALENA BAY NOTHING MORE TO ADD UNQUOTE.

NORRIS–Master.

[Copy of Telegram Sent by Struthers & Dixon, Inc., San Francisco.]

WESTERN UNION WIRELESS

May 26, 1920.

Capt. Norris,

Steamer, City of Omaha" (At Sea),

1310 Miles from San Francisco.

SHIPPING BOARD HAS WIRELESS COCKAPONSET AND DIABLO INTRUCTING NEAREST PROCEED MAGALENA BAY TOW YOU TO SAN FRANCISCO THEY WILL GET IN WIRELESS COMMUNICATION WITH YOU AND ARRANGE WHICH VESSEL HANDLED IF NECESSARY CALL ON NAVY FOR ASSISTANCE ADVISE US POSITION PROGESS DEVELOPMENTS DAILY.

STRUTHERS.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

B182Sf ZO 52 VIA NOG JCT WU

Received SF 5–27–20.

MAZATLAN SIN MEX—MAY 26, 1920

STRUTHERS & DIXON INC

343 SANSOME STREET

SAN FRANCISCO CALIFORNIA

CITY OF OMAHA

CITY OF OMAHA NOON POSITION THIS

DATE LAT 20 R 50 NORTH LONG R 107 R 50 WEST 1310 MILES FROM SAN FRANCISCO TUBES IN ALL BOILERS LETTING GO HAVE STOP AND PLUG SAME FREQUENTLY MAKING VERY POOR HEADWAY SITUATION SEEMS TO BE GETTING WORSE HAVE YOU ANY SUGGESTIONS TO MAKE PLEASE REPLY PROMPTLY

NORRIS, Master.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

(Received SF 5–27–20)

GS SM 48 RADIO VIA Postal
SANPEDRO–SS CITY OF OMAHA
Struthers & Dixon, Inc.
343 Sansome Street,
San Francisco, California.
CITY OF OMAHA
CITY OF OMAHA POSITION LATITUDE 2053 NORTH LONGITUDE 10732 WEST HAVE STARTED AFTER STOPPING 33 HOURS TO MAKE BOILER REPAIRS HAVE DECIDED IF BOILERS GIVE OUT AGAIN TO TRY AND MAKE MAGDALENA BAY AWAITING YOUR ADVICE CABLED NEWYORK SITUATION 23rd. NO REPLY

NORRIS, Master.

[Copy of Telegram Sent by Struthers & Dixon, Inc., San Francisco.]

San Francisco, May 27, 1920.

Captain Norris (via Western Union)
SS City of Omaha at Sea
1310 Miles from Southeast of San Francisco.
Wireless from Mazatlan, Sinaloa, Mexico.

Shipping Board has wirelessed COCKAPONSET and DIABLO instructing nearest proceed Magdalena Bay tow you to San Francisco they will get in wireless communication with you and arrange which vessel handles. If necessary call on Navy for assistance. Advice us position progess developments daily.

STRUTHERS & DIXON.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

CITY OF OMAHA—MAY 29 WU

(Received SF 7–29–20)

Struthers & Dixon, Inc.
343 Sansome Street,
San Francisco, Calif.

CITY OF OMAHA

POSITION SS OMAHA LAT 2127 NORTH LONG 10815 WEST YOUR MESSAGE RECD SHIP ABOUT DISABLED HAVE ASKED NAVY SHIP REGARDING TOW TO MAGDALENA BAY NO REPLY YET SO FAR UNABLE LOCATE COCKAPONSET OR DIABLO

NORRIS, Master.

[Copy of Telegram Sent by Struthers & Dixon, Inc., San Francisco.]

FAST MESSAGE

May 29, 1920.

Master,
City of Omaha,
1300 Miles south San Francisxo
Wireless via *N*azat*i*an, Sinaloa, Mexico.

Navy Department has detailed Orion tow you Magdalena Bay Continous efforts communicate Cockaponset Diable Keep us advised progess

STRUTHERS & DIXON, Inc.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

YB WB 31 RADIO VIA Y B S F WU
CITY OF OMAHA—May 29, 1920.
(Received SF 7–29–20)

Struthers & Dixon, Inc.
343 Sansome Street,
San Francisco, Calif.

CITY OF OMAHA
COCKAPONSET TOOK OMAHA IN TOW 100 PM TODAY LAT 21, 14 N LONG 107.58 W MAKING SIX KNOTS BOILERS ALL OUT COMMISSION STEERING SHIP HAND GEAR

NORRIS, Master.

257A May 30, L920

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

A 77GS 33 RADIO VIA P J WU

(Received SF 7–29–20)

SANPEDRO CALIF

CITY OF OMAHA

Struthers & Dixon, Inc.

343 Sansome Street,

San Francisco, Calif.

CITY OF OMAHA

COCKAPONSET TOWING OMAHA MAGDALENA BAY ABEAM 520–PM FINE WEATHER MAKING ALMOST SEVEN KNOTS 9–PM HAWSER PARTED 11–PM TOW MADE FAST AGAIN HAVE STEAM AT PRESENT TO STEER SHIP

NORRIS.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

94 ;GSOS 23 RADIO VIA P J *Postal*

(Received SF 6–2–20)

SANPEDRO—SS CITY OF OMAHA

May 30, 1920

Struthers & Dixon, Inc.

343 Sansome Street,

San Francisco, Calif.

CITY OF OMAHA

COCKAPONSET TOWING OMAHA CAPE SAN LUIS ABEAM FIVE AVERAGING SIX KNOTS FRESH NORTH WEST WINDS NO STEAM ON SHIP.

NORRIS, Master.

[Copy of Telegram Received by Struthers & Dixon, Inc., San Francisco.]

CITY OF OMAHA—June 1 *Postal*

(Received SF 6–2–20)

STRUTHERS & DIXON, Inc.
343 SANSOME STREET,
SAN FRANCISCO, CALIFORNIA.

CITY OF OMAHA

POSITION OF OMAHA NOON TUESDAY LATITUDE 2550 NORTH LONGITUDE 11324 WEST AVERAGING SIX POINT FIVE KNOTS STEAM ON SHIP FOR STEERING COCKAPONSA CARGO FOR SAN PEDRO ARE YOU ARRANGING FOR OMAHA TOWING DIRECT TO SAN FRAN

NORRIS, Master.

[Endorsed]: United States District Court. No. 16,871. Nelson vs. Omaha, Respts. Exhibit "A." Filed Nov. 5, 1920. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3687. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 13, 1921. F. D. Monckton, Clerk.

No. 3687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES VAN ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,
Appellees.

BRIEF OF APPELLANT

UNITED STATES OF AMERICA

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION IN ADMIRALTY.

JOHN T. WILLIAMS,
United States Attorney,

FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,
Proctors for Appellant.

Neal, Stratford & Kerr, S. F. 16599

No. 3687

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THE UNITED STATES OF AMERICA,
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R. J. NELSON, M. BURNS, JAS. ALLEN, R. W. KELLY, C. VANDERLEY, G. SWANSON, C. B. PETTERSON, K. H. NIEMI, PETER EMMERS, S. JOHANNSEN, ANDRIES VAN ROON, LENHART SAARNIA, L. R. DRAKE, F. JORGENSEN, A. A. KRUTMEYER, JOHN R. WHALEN, V. J. RISARDO, C. J. SULLIVAN, J. E. GOUGH, A. H. LAKE, P. S. MURRAY, E. J. FARRELL, R. SCHULZ, S. H. HINRICHI, D. L. HEYWOOD, JAMES MOORE and PATRICK O'MARA,
Appellees.

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION IN ADMIRALTY.

STATEMENT OF THE CASE.

In June, 1920, the first, second and third mate, and a portion, namely, twenty-four members of the crew, of the S. S. "Cockaponset" sued the United States in the Southern Division of the United States District Court for the Northern District of California, First Division in Admiralty, on account of salvage services alleged to have been rendered by them to the S. S. "City of Omaha" between May 29, 1920, and June 5, 1920. Both of the vessels were owned by the United States at the time. (Tr. pp. 13-17).

The value of the "City of Omaha" at the time the services were rendered was approximately One Million Nine Hundred and Twenty Thousand Dollars, and the value of her cargo was about Six Hundred and Six Thousand, Four Hundred and Seventy-five Dollars. (Tr. p. 25). The value of the "Cockaponset" and her cargo is not shown by the record. It does not appear that the cargo on the "City of Omaha" was owned by the United States. At the time in question the total amount of the wages of the officers and crew of the "Cockaponset" was Five Thousand Two Hundred and Twenty Dollars per month, her master's pay was Three Hundred and Fifty-seven Dollars and Fifty Cents per month, and that of her supercargo was One Hundred and Fifty-five Dollars per month, making in all a pay-roll of Five Thousand Seven Hundred and Thirty-two Dollars and Fifty Cents per month. (Tr. p. 40).

The District Judge awarded each of the libelants an amount equal to two months' pay, this being equivalent to Eleven Thousand Four Hundred and Sixty-five Dollars, had all the officers and members of the crew of the "Cockaponset" been parties to the litigation. (Tr. p. 64).

The facts are not complicated. While on a voyage from Baltimore, Maryland, to Yokohama and Kobe, Japan, (Tr. p. 45), the "City of Omaha" experienced boiler and engine trouble, and on May 23, 1920, her master wirelessed the agents of the vessel at San Francisco, California, for advice as to what should be done in the event that the boilers failed entirely. (Tr. pp. 94-95). On May 26, 1920, the master again wirelessed the agents that the vessel was making very poor headway, and the situation seemed to be getting worse, and asked for suggestions. The agents in reply wirelessed the "City of Omaha" on May 27, 1920, that the United States Shipping Board had wirelessed the S. S. "Cockaponset" and the S. S. "Diablo" instructing the nearest of those vessels to proceed to Magdalena Bay and tow the "City of Omaha" to San Francisco, and for the "City of Omaha" to call upon the Navy for assistance if necessary. (Tr. pp. 96-98).

This last message was overheard by the "Cockaponset" and her master directed the wireless operator to call up the "City of Omaha' and ask if any assistance was required. This was done, and a reply was received from the "City of Omaha" in

the affirmative. (Tr. p. 41). The vessels were then only about twenty miles apart. (Tr. p. 61).

At noon on May 29, 1920, the "Cockaponset" arrived at the place where the "City of Omaha" was located, and took that vessel in tow, the position of the vessels then being, latitude 21° 14′ north, and longitude 107° 50′ west. (Tr. p. 91.) At this time all of the boilers of the "City of Omaha' were out of commission, and she was steered by her hand gear aft. (Tr. p. 91).

The "City of Omaha" had some boiler trouble between Baltimore and Colon, (Tr. p. 52), and the vessel received some injury in going through the Panama Canal (Tr. p. 49), but that injury had no relation to the boiler trouble that necessitated the towage services now under consideration. (Tr. p. 52).

After leaving the Canal the difficulty with the boilers continued and on May 1, 1920, the "City of Omaha" put into the inner harbor of Salina Cruz, remaining there until May 17, 1920, while her boilers were undergoing repairs. (Tr. pp. 89-90).

On May 17, 1920, the "City of Omaha" left Salina Cruz and proceeded on the way to San Francisco, California. (Tr. p. 90). Between May 17th and the time when the "Cockaponset" took the "City of Omaha" in tow on May 29, 1920, there was further trouble with the boilers of the "City of Omaha" which necessitated the stopping of her en-

gines while boiler repairs were being made at sea. (Tr. pp. 90-91).

The towing operations continued from about noon on May 29, 1920, until 3:15 a. m. on June 5, 1920, when the vessels arrived in San Pedro Roads, California. (Tr. pp. 91-92). The tow line was not cast off, however, until 6:30 a. m. of June 5, 1920. (Tr. p. 42). During the period of towing, the boilers of the "City of Omaha" were not entirely out of commission, but were in such condition as to enable her to be steered by steam on two days, viz., May 31 and June 1. During the remainder of the time the hand steering gear of the "City of Omaha" was used. (Tr. pp. 91-92).

On May 31, 1920, the "Cockaponset" slowed down to enable the "City of Omaha" to change gears from hand to steam, and upon going ahead again the hawser parted at the stern chock of the "Cockaponset", (Tr. p. 91), but this was not on account of any heavy sea or bad weather.

At the time the 'Cockaponset" performed the towage services she was bound for San Francisco, California, from the Panama Canal, (Tr. p. 29), and so was not called upon to go out of her way. The approximate time lost to her was only two and one-half days, and involved only an extra consumption of five hundred and fifty barrels of fuel oil and ten gallons of engine oil, and provisions and wages for the crew covering two and a half days. She lost a log line and rotator because of the poor steering

quality of the "City of Omaha" or, as the master of the "Cockaponset' said, because of her "steering wildly" (Tr. p. 42), but the poor steering of the "City of Omaha" could not, in view of the length of the tow lines and the weather conditions, have endangered either the "Cockaponset' or any of her crew.

The total distance the "Cockaponset" towed the "City of Omaha" was nine hundred and fifty-two miles. At no time, either during the towing operations or while the "City of Omaha" was in a disabled or partly disabled condition was the weather other than fair. (Tr. pp. 42, 46, 49, 56). The towing lines were furnished entirely by the "City of Omaha", and were passed by the crew of that vessel to the "Cockaponset". (Tr. pp. 47-48). The "City of Omaha" was almost directly in the path of vessels en route between United States ports and the Canal Zone. (Tr. p. 49). Although when the boilers of the "City of Omaha" were out of commission she could not be lighted by electricity, yet oil lamps were available. (Tr. p. 57).

Besides being in communication with the S. S. "Diablo" and the "Cockaponset" while she was in trouble, the "City of Omaha" was also spoken to by two other steamers, southbound, who inquired whether she needed assistance. (Tr. p. 61). When the "Cockaponset" picked up the "City of Omaha" on May 29, 1921, the latter vessel was north of Acapulco and north of Manzanillo, and about one

hundred and eighty miles away from Cape San Lucas, according to her master's testimony. According to her position on May 29th, as shown by her log (Tr. p. 91) the "City of Omaha" was 151.65 miles from San Blas, and 243.7 miles from Manzanillo. (Tr. pp. 31, 32). The expert witness called by the proctor for libelants, gave it as his opinion that the "City of Omaha" was not in any danger in that position, under the circumstances as they existed (Tr. p. 33), with her hull sound and with wireless on board. (Tr. pp. 33-35). She was in the open ocean, he said, and was in a position to do considerable drifting, and in the meantime send a boat ashore for assistance, (Tr. pp. 33-35), and, in the event of a heavy storm she could have used her anchors effectively. (Tr. pp. 33-40).

The circumstances appearing in the record (Tr. pp. 40, 58) concerning the wreck of the S. S. "Colima" many years ago, how near she was to the shore, the weather conditions, and the other material facts are too meagre to be of any assistance in this case.

The bad weather between Cape San Lucas and Manzanillo seems generally to occur in the winter season. (Tr. p. 58). During May and the early part of June the weather conditions are generally fair, according to the testimony of libelant's expert (Tr. p. 36), and this testimony is borne out by the extract read in evidence by the proctor for libelants from the book published by the Hydrographic Office

at Washington, the extract being as follows (Tr. p. 30):

> "*San Blas.* Seasons, winds—The southerly winds begin in June and end in November; they are accompanied by much rain, do not blow steadily, and are interrupted by frequent squalls from different points of the horizon, and generally wind up with a dangerous and violent storm. *As this storm, which is always from between southeastward and southwestward, most commonly happens about the time of the festival of St. Francis, the fifth of October,* it has received the local name, 'Cordonazo de San Francisco'; *but it is* sometimes considerably later and then does more damage from coming when the danger is no longer apprehended.
>
> During the dry season the weather is constantly fine. The winds prevail regularly during the day from northwest to west, following the direction of the coast, and are succeeded at night by a light breeze from the land or a calm."

The bad weather seems to come, not in May or June, but much later in the season. And even in bad stormy weather, whatever the danger might be to vessels near shore, there seems to be little to those away out in the open sea, such as was the position of the "City of Omaha" at the time she required towage services. *The "City of Omaha" was then in no danger, and was in need of no assistance beyond that which is ordinarily known and designated as towage.*

A towage service performed under such circumstances as appear in the record in this case, does not warrant an award of the equivalent of over Eleven Thousand Dollars to the officers and crew alone of the "Cockaponset". Neither the 'Cockaponset" nor her crew were ever in the slightest danger, and aside from watching the tow lines on that vessel, it is hard to conceive what duty any member of her crew had to perform during the time the service continued.

SPECIFICATION OF ERRORS RELIED UPON BY THE APPELLANT.

1. The Court erred in awarding to the libelants, or any of them, any amount whatsoever for alleged salvage services to the S. S. "City of Omaha".

2. The Court erred in awarding to the libelants, and to each of them, two months' pay for salvage services alleged to have been rendered by them to the S. S. "City of Omaha" and in awarding to said libelants, and to each of them, any amount in excess of one month's pay to each of them as compensation for said alleged salvage services.

3. The Court erred in failing to render a decision and order judgment entered in favor of the appellant, the United States of America, dismissing the libel of the libelants filed in said cause.

4. The Court erred in awarding to the libelants, and to each of them, any amount whatsoever, for the reason that said libelants were, at the time of

the alleged salvage service, members of the crew of a vessel belonging to the United States of America, and rendered salvage services, if any, to a vessel likewise belonging to the said United States of America, and by reason thereof it became the duty of the said libelants and each of them to render said services, without compensation beyond their wages as seamen on said United States vessel.

BRIEF OF THE ARGUMENT.

There is nothing in the record that warrants the assumption that the services rendered to the "City of Omaha" by the "Cockaponset" constituted anything more than ordinary towage. Assuming, however, for the sake of argument, that those services constituted salvage, it was certainly salvage of a very low order, that did not warrant the excessive award made.

In the case of *The Melderskin,* 249 Fed. 776, the award was as great if not greater than that found in any of the adjudicated cases involving towage, but even though the facts in that case indicated a salvage service beyond question, yet the amount awarded to the master, officers and crew of the salving vessels, the S. S. "Hesperides", was much less than the amount awarded in the present case.

The facts in the "Melderskin" case not only showed large values at risk, but much immediate danger not only to the disabled vessel and to the salving vessel, but to their officers and crews. In

September, 1915, the "Melderskin" while on a voyage from Santos to New York, laden with coffee, broke her tail shaft, and totally lost her propeller. Her subsequent efforts to sail resulted in her not even getting steerage way, although there was plenty of wind. She drifted 210 knots in a period of 9 days, and when 180 knots east of San Salvador fell in with the S. S. "Hesperides", a large vessel with a valuable cargo. The "Hesperides" towed the "Melderskin" a distance of 890 knots in 10 days, and landed her at Tybee Roads. During most of the time this service was being performed heavy seas rendered the towing exceedingly difficult, and while the services were being performed there was great risk of hurricanes arising, September being known as a "hurricane month". Before the "Melderskin" was brought to a place of safety, the tow lines broke three times, owing to stress of weather. There was no radio apparatus on the disabled vessel. Her value at risk, including cargo and freight, was approximately $1,450,000. The expenditures of the "Hesperides" for coal, oil, hawsers, etc., made necessary by the service, amounted to almost $2,000.00. Under these circumstances the Court made an award of $45,000.00 and expenses, one-fifth of this amount to go to the master and crew of the "Hesperides", in proportion to their respective wages, except that the master, the chief, second and third mates, and four engineers were awarded a double share out of the fifth. The salvage service in the "Melderskin" case, in view of the circumstances, was of a very

high order. It was salvage in the true sense of the word, and not mere towage, and yet the award made was much less than in the case at bar.

Another case where a substantial award was made under circumstances clearly indicating a true salvage service is that of *The Varzin,* 180 Fed. 892. In that case it appears that the "Varzin", while on a voyage from Australia to Boston and New York, broke her propeller shaft when about 350 miles from Boston. She was water tight, and otherwise seaworthy. Her sails were not intended for independent navigation, and she could not shape her course with them in bad weather. On February 1st, she was spoken to by the S. S. "Erika", then on a voyage from New York to the Azores and Lisbon. The "Erika" took her in tow, and the vessels reached Boston on February 9th. Before the "Varzin" was taken in tow the "Erika" had to stand by during the whole night, because the swell was so heavy and the weather so bad that nothing could then be done safely. By daybreak the wind had increased to a squall. Much stormy weather was encountered by the vessels while the towage service was being rendered. On the night of February 4th there was a hurricane, and at 8:30 p. m. on that day the hawser parted and the "Varzin" went adrift. While waiting for the storm to abate the vessels drifted from their course. During this heavy water there was considerable danger to the "Erika" owing to the heavy tow, and she was somewhat strained. On February 5th, after the

"Erika" had stood by all night, a hawser was heaved aboard the "Erika" by the "Varzin", and the towing continued. On February 7th snow squalls and bad weather was again encountered. The "Varzin" at the time, with her cargo and freight at risk, was worth $1,500,000.00. The services rendered took the "Erika" 10 days and 13 hours, including 36 hours spent in standing by, and her schedule in Spain was disarranged. The Court under these circumstances of extreme peril made an award to the "Erika" of $45,000.00 and expenses for coal, repairs, etc., and *in allowing this amount the Court admitted that it was fixing a larger award than had theretofore been granted, but excused the largeness of the award by reason of the great value of the property saved and its danger.*

In neither of the cases just referred to was the service rendered to the disabled vessel at all similar to the service rendered to the "City of Omaha" in the present case. A very similar case, however, is found in *Bergher et al. v. General Petroleum Company et al.,* 242 Fed. 967, the award in that case having been made by Judge Dooling of this district. In that case the S. S. "Mills' on August 1, 1915, became disabled, while off the west coast of Mexico, because, owing to the dirt and water in her fuel oil, she was unable to make steam. In this condition she difted with the wind at the rate of about one mile per hour until August 5, 1915, and then was picked up by the S. S. "Francis Hanify" and towed to San Pedro. During the four days that elapsed

immediately before she was taken in tow she had drifted from a position about 60 miles from shore to a position about 10 miles off shore. The towage was under contract at about regular charter rates. The towing took about 3 days and 4 hours. No agreement whatever was made with the crew, and nothing paid them except their regular wages, and they sued in admiralty for their services. Each vessel was worth about $200,000.00. Judge Dooling held in this case that the circumstances indicated that the service was one of salvage, although this conclusion seems to be based upon the fact that the disabled vessel had drifted to within 8 or 10 miles from shore, and he allowed to each member of the crew compensation equivalent to one-half month's pay. The services in the case do not appear to have been more than ordinary, and the main difference between the Bergher case and the one now under consideration seems to be in the matter of values, but as we will show later, the question of value, unless there is considerable risk, is a matter of minor consideration.

One-half month's pay to each member of the crew was also awarded in *The Roanoke,* 209 Fed. 114, and this award was sustained by the Circuit Court of Appeals of this Circuit in 214 Fed. 63. The "Roanoke", worth about $150,000.00, and carrying 93 passengers and cargo, became disabled by the loss of her propeller in the neighborhood of Point Arguello, while bound from San Pedro to San Francisco. After drifting for some time she an-

chored in 14 fathoms of water, one-half to three-quarters of a mile from shore. The S. S. "Santa Clara" came to her assistance in response to a call, and took her in tow. The Circuit Court of Appeals said that it thought the allowance liberal and in excess of what it would have awarded, but allowed it to stand with the comment, that while the service was not of a high order, it was entitled to be classed as salvage service.

The Wellington, 52 Fed. 605, is a sample of an award where the dangers and risks were much greater than in the present case, although the award was much less. The "Wellington", en route from British Columbia to San Francisco with coal, broke her shaft. An attempt was made by a steamer to tow her, which failed because of lack of suitable hawsers. The "Wellington" was afterward sighted by the S. S. "San Pedro", 90 miles south of Cape Flattery, in a helpless condition, and while a southeast gale was blowing. After two hours of skillful work, which resulted in some injuries to the master and crew of the "San Pedro", the "Wellington" was taken in tow and brought to "Royal Roads", about 250 miles distant. The gale continued while this service was being rendered. The "Wellington" had a value of about $100,000.00, not including her cargo. During the time the towing lines were being made secure, the sea was rough, and the situation was one of imminent danger to both vessels. The towage service lasted about 22 hours, and while it was being performed the "Well-

ington'' steered badly. The award in this case was $2,500 to the master of the ''San Pedro'' and $100 to each member of her crew who was a party to the libel.

In this case the Court held that when the value of the salved ship is small the salvors are entitled to a larger percentage than where it is large, and that where the value of the salving vessel, and therefore the risk, is large, the award should be greater and the ratio of the owner's share to that of the master and crew should be larger than where the value of the salving vessel is small.

The rule to be applied in cases where the salvage, as in the case at bar, amounts to little more than ordinary towage, was laid down by Judge Morrow in the case of *The Monticello,* 81 Fed. 211. The boiler of the ''Monticello'' had broken down between Point Arena and Point Reyes, about 100 miles from San Francisco. The vessel was attempting to proceed under a jib sail, and was in no particular danger of going ashore before assistance sent for would arrive, although a W.N.W. wind tended to drive the ''Monticello'' towards shore, and she could do but little more than keep her steerage way. The S. S. ''San Benito'', after several unsuccessful attempts, took the ''Monticello'' in tow, and pulled her to San Francisco. The salving vessel with her cargo was worth about $445,000.00, and the salved vessel about $12,000.00. The ''Monticello'' evidently was in some danger,

as she was but from 5 to 15 miles from shore. The "San Benito" experienced no risk or danger. The Court held under these circumstances that it was not a case of ordinary but of extraordinary towage, which required reasonable compensation, and awarded the sum of $350.00 for the service. It was held that the taking of the "Monticello" in tow by a passing steamer in the ordinary weather of the season, if a salvage service was of a very low order, and that the fact that the "Monticello" was in part disabled, and that the state of the wind and sea was such as would in time probably have caused her to drift ashore, was no ground for increasing the compensation when it was certain that assistance in any event would have reached her before the danger became imminent. It was held in the case that even if the towing scarcely amounted to the dignity of a salving service it would be compensated at a somewhat greater rate than that of towage by tugs intended for the purpose.

The "Monticello" appears to have been in at least as perilous a condition as was the "City of Omaha" when she was taken in tow by the "Cockaponset".

A case in which the weather conditions and the risks involved are somewhat similar to the present case is that of *The Catalina,* 105 Fed. 633. There the "Catalina", a large Spanish steamship valued at $200,000.00, while in the Gulf of Mexico, on her

way in ballast from a Mexican port to New Orleans, broke her propeller shaft beyond temporary repair. She then attempted to proceed by sail, but was becalmed about 60 miles from the mouth of the River, and during the night signaled the S. S. "Olympia" for assistance. The "Olympia" agreed to tow her to the South Pass, the amount of compensation to be determined later. The crew of the "Catalina" delivered a hawser on board the "Olympia" and the towage was performed in safety, the weather being calm and the sea smooth. The "Olympia" was delayed by the service about 24 hours. The Court said that it was unable to perceive that the services rendered to the "Catalina" by the "Olympia" were attended with any extra risk not accompanying ordinary towage, except that they were rendered by a ship not constructed for nor engaged in the towing business, and that while it agreed with the District Court in holding that the services rendered were salvage services, it was clearly of the opinion that they should be held to be salvage services of a low order, *and should be compensated on the basis of towage services,* an equal amount to be added as salvage compensation.

Another case in which the Court held that the award should be made on the basis of the commercial value of the service is that of *The New Camelia,* 105 Fed. 637. The "New Camelia", a steamer worth $35,000, and having on board 150 passengers, broke her shaft when in the middle of Lake Ponchartrain, and became wholly disabled from further

navigation. She was towed to port by a tug, the service requiring but a short time. The value of the service was estimated at from $15.00 to $30.00. Subsequently members of the crew of the tug libeled the steamer for salvage service, and the lower Court fixed the value of such services at 5% of the value of the salved vessel, amounting to $1750.00, and apportioned one-half to the crew of the tug, which was equal to about three months' wages. It was held by the Circuit Court of Appeals that while the services rendered might properly be considered salvage services, they were not of such an order of merit on the part of the crew as to justify the award made to them, and that the vessel not having been in great peril, *the total award should not exceed double the value of such services.* The Court was of the opinion in this case that the service was of the lowest order of salvage, and should be compensated for on the basis of work and labor, and said *that a vessel that is so unfortunate as to break its shaft and lose its propelling power, thus putting its owners to delay and expense, ought not to be mulcted with large compensation to alleged rescuers who have been minor factors in rendering assistance.*

The Robert S. Besnard, 144 Fed. 992, is authority for the proposition that if a vessel is in a position which requires towage service only, the mere fact that she had previously suffered injury does not change the nature of the service to one of salvage, unless there are some circumstances of peril, im-

mediate or to be reasonably apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel. This case discusses at length the distinction between towage, under which the crew would not be entitled to additional compensation, and salvage, in which case they would.

The award made in the present case can only be accounted for upon the assumption that the District Judge overlooked the fact that the circumstances were such as to establish that the services rendered by the "Cockaponset" to the "City of Omaha" constituted merely ordinary towage, and had none of the elements that are found in true salvage. The "City of Omaha" was in no immediate danger, neither was the "Cockaponset". The "City of Omaha" was near the beaten path of vessels plying between United States ports and the Canal Zone. She was a long distance from any land, and the weather conditions were good. She did not need to be salved. She was in need of towage service only. The crew of the "Cockaponset", so far as the record shows, did nothing. Even the tow lines were passed between the vessels by the crew of the "City of Omaha".

It is true that the "City of Omaha" had a value of $1,920,000.00, but that, as shown by the cases, was a minor factor. Her cargo was not owned by the United States, and should not be taken into consideration in the present libel suit.

The theory that salvage services should be based on values is now practically abandoned, particularly where those values are enormous and the actual service and risk is small. In the case of *The Kia Ora,* 246 Fed. 143, counsel for the respondent insisted that in fixing a salvage allowance the Court should not undertake to base it upon a percentage of the value saved, because that method is antiquated and should no longer be followed, and the Court said it was inclined to concur in the view that such was not the proper and certainly not the practical rule of arriving at a fair and just compensation where the values salved are large.

The theory of awarding to salvers a percentage of the value salved grew up at a time when vessels were comparatively small and were not propelled by steam, and when there was not available to the maritime world the benefits of the wireless system of communication.

In *The Gambetta,* 74 Fed. 259, the principle was laid down that the exact value of property saved, when large, is a minor element in computing salvage, and as the value increases the rate percent given is rapidly reduced, and that it is compensation for actual service rendered, and a reasonable gratuity for the benefit of commerce that is contemplated, and not a fixed percentage of the property saved.

So far as the share that should be awarded to the crew is concerned, in the recent case of *Rivers* v.

Lockwood, 239 Fed. 380, the Court held that crews of tugs were entitled to receive ten per cent of the full award when the service consisted chiefly of towage based upon a salvage basis.

In ancient times, when the personal heroism of members of the crew of a vessel entered largely into the salvage services rendered, it was customary to set aside to them a large proportion of the total award. At the present time, when the owner of the salving vessel has frequently at risk property worth millions of dollars, and the actual services rendered by the members of the crew amount to little more than services they are called to perform as part of their ordinary daily duties, the policy of the law has been to award to the owner of the salving vessel a larger proportion of a total award than he would have received under the old conditions.

It is respectfully submitted in this case that the evidence shows nothing more than ordinary towage, for which the libelants would not, under the law, be entitled to recover any additional compensation. Should, however, the Court feel that the service, although constituting little more than ordinary towage, has in it some of the elements of salvage, the respondents contend that the compensation to be awarded to the libelants for the service should not be based upon the large values shown to exist, but should be based upon actual service rendered by the libelants for which they have not already

been compensated, together with such a reasonable additional amount as would be fair and proper within the limits of the cases relied on in this brief, having in mind the fact that no additional unreasonable burden should be placed upon a merchant marine already struggling under handicaps almost too heavy to bear.

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FREDERICK MILVERTON,
Special Assistant United States Attorney in Admiralty,

Proctors for Appellant.

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No. 3687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

R. J. NELSON et al.,
Appellees.

BRIEF FOR APPELLEES.

H. W. HUTTON,
Proctor for Appellees.

No. 3687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

R. J. NELSON et al.,
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BRIEF FOR APPELLEES.

In this case the steam vessel City of Omaha, owned by the United States and engaged in the merchant service of the United States, left Norfolk, Virginia, bound to Japan via the Panama Canal. She was of the value of approximately $2,000,000.00 and her cargo was of the value of $606,475.00, making a total value of $2,606,475.00 (Trans. pages 24 and 25).

The wages of the *officers* and crew of the Cockaponset were $5.220.00 per month—not $5,220.00 per month—plus $375.50 and $155.00 as stated on page 2 of appellant's brief. The master is an officer. The total of all is $5,220.00. The purser is also an officer, and the language is "the *total* wages of the *officers*

and crew''—not the wages of the officers and crew exclusive of the captain and super-cargo.

The award for the officers and crew would, therefore, be the sum of $10,440.00, and, on the basis of 25% to the crew, would make a total award of $41,-760.00 for the whole service. That amount does not seem to be large, but on the contrary it seems to be small for a salvage service that occupied nearly seven days in performing and in which the vessel and property salved were towed 956 miles (Trans. page 60).

The City of Omaha was a new vessel; but it appears that she had boiler trouble, having first gone ashore in the Panama Canal and had her fore peak perforated, which was repaired. She subsequently put into Salina Cruz for repairs to her boilers, where she stayed 18 days, under repairs. She then left and her boilers began to trouble again, and went from bad to worse until she finally stopped altogether (Trans. page 55). She is ordinarily lighted by electricity and, when the boilers gave out, she had to light with oil lamps (Trans. page 57). Neither could she steer by steam, but had to steer by hand. That was very difficult as it caused the ship to steer wildly and caused the breaking of the tow line. It appears they had steam one day after the towing commenced (Trans. page 57). She was spoken by two vessels bound south. The Cockaponset was bound north. Of course if a south bound vessel had turned around and performed the work the award would have had to have been much

higher. We will not state the areograms in this brief, but respectfully call the court's attention to the same as printed on pages 94 to 101 of Transcript.

We also call the court's attention to the testimony.

I.

ARGUMENT.

On pages 30 and 31 of Transcript we find the weather probabilities for the region where the City of Omaha was picked up, as given by the United States Hydrographic Office. Those probabilities are for all years, and not for the single year the Colima was lost. In the case of

The Colima, 82 Fed. 665,

it appears that that vessel encountered one of the storms mentioned three days earlier in the year and was lost with large loss of life. Of course the question in this case is, Is the award of two months' pay fair, or was it an abuse of discretion to award that amount?

The United States cites cases in its brief. Under either of them the award in this case is low. We will first take the case of

The Melderkin, 249 Fed. 776.

Of course it will be remembered that in September, 1915, when the service was performed in that case, the purchasing power of money was much

higher than in 1920, when the services in this case were performed, and the award of $45,000.00 would be much larger than a corresponding amount in 1920—probably about double—but the Melderkin does not seem to have been in a much worse way than the City of Omaha—not as bad in fact, as she had steam, could steer by steam and light by steam.

The values in that case were $1,450,000.00.

The distance towed was in knots 890.

The distance towed was less in knots by knots 66.

And the values were but 55.6% of the values here. Without allowing for the difference in the purchasing power of money, or the distance towed, or the difficulty in towing, on the same basis of the total award in that case, the award in this case should have been a total of $64,980.00. And on a basis of 25% to the crew the award should be $16,245.00.

The same figures apply to the case of

The Varzin, 180 Fed. 892.

We fail to see where the United States is hurt in this case.

In all the other cases cited in appellant's brief, the values were small, the distance short. In the case of

The Wellington, 52 Fed. 605,

the values were $100,000.00. However, the court gave each seaman $100.00. At that time the wages of seamen were $40.00 per month, so they received two and one-half months' pay on a valuation of $100,000.00. The task in this case was almost as

difficult. It was just as difficult except for the weather.

In the case of

The Avalon, 255 Fed. 854,

this court increased the award from $2000.00 to $5000.00. The values were $481,000.00, the distance towed does not appear but the towing occupied 18 hours. On the same ratio, the award in this case should be about $75,000.00.

In the case of

The Kanawha, 234 Fed. 762,

the vessel was towed about the same length of time. The City of Omaha was towed possibly a few hours longer, the values were a total of ship and cargo, $537,858.34. The award was $34,600.00.

On the same ratio the total award in this case should be about $297,900.00 and the award to the crew 25% of that or $51,975.00.

We respectfully submit that the award in this case is low rather than high.

II.

THE UNITED STATES IS LIABLE FOR THE CARGO'S SHARE OF THE SALVAGE.

Counsel states on page 20 of brief, as follows:

> "Her cargo was not owned by the United States, and should not be taken into consideration in the present libel".

The United States has blown hot and cold in this case. In the lower court it obtained an amendment to the decree upon the ground that the United States was liable for all the salvage and a decree could not run against the cargo (Trans. pages 68-69).

The law is as follows:

Sec. 3, of the Act of March 9th, 1920:

> "* * * If the libelant so elects in his libel the suit may proceed in accordance with the principles in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder." * * *

Sec. 8.

> "That any final judgment rendered in any suit herein authorized and any final judgment within the purview of Sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of Section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor: otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay such judgment or award or settlement".

For further argument upon this subject we refer to brief in United States v. Miles et al., argued orally in this case.

Section 2 expressly states that a libel *in personam* may be brought against the United States, it reading in part:

> "a libel *in personam* may be brought against the United States".

In conclusion we beg to state that the salvage service in this case was performed May, 1920. A cursory analysis of the authorities cited in appellant's brief, that we have not commented on, shows the award low rather than high, and it seems that the delay in this and the case of The United States v. Otis E. Miles et al. will tend to discourage, rather than procure, salvage services at sea. The decree in this and the Miles case was signed March 1st, 1921, and no good reason appears for the failure to have the appeals on the May calendar of this court.

We respectfully submit that the award should be increased, with interest and costs.

Dated, San Francisco,
October 19, 1921.

H. W. Hutton,
Proctor for Appellees.

No. 3690

United States
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Circuit Court of Appeals

For the Ninth Circuit.

GEORGE U. HIND and JAMES ROLPH, Jr.,
Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

Messrs. ANDROS & HENGSTLER, Attorneys for Plaintiffs in Error,
Kohl Building, San Francisco, California.

BEVERLY L. HODGHEAD, Esq., Attorney for Defendant in Error,
58 Sutter Street, San Francisco, California.

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

No. 16,059.

GEORGE U. HIND and JAMES ROLPH, Jr.,
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

Complaint.

Now come plaintiffs above named and complain of defendant and for cause of action allege:

I.

That at all the times herein mentioned plaintiff George U. Hind was and now is a resident of the City of San Rafael, Marin County, said Northern District of California, and a citizen of the State of California; that at all of said times plaintiff James Rolph, Jr., was and now is a resident of the said City and County of San Francisco, said North-

ern District of California, and a citizen of the State of California; that at all of said times said plaintiffs George U. Hind and James Rolph, Jr., were and now are copartners doing a general shipping and commission business in the said City and County of San Francisco, said Northern District of California, under the firm name and style of Hind, Rolph & Co., being duly authorized thereunto by the laws of the said State of California.

II.

That at all times herein mentioned defendant Western Union Telegraph Company was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of the said State of New York.

III.

That at all times herein mentioned said defendant was [1*] organized for and regularly engaged in, among other things, the business of receiving, transmitting and delivering communications and messages for the general public for hire between various places and states within the United States, and between the City of London, England, and said places and states, including the receipt, transmission and delivery of communications and messages between the said City of London, England, and the said City of San Francisco, for the general public for hire.

IV.

That prior to February 25, 1916, F. Green & Co., at the said City of London, England, were negotiating, in behalf of said plaintiffs, for the sale of a

*Page-number appearing at foot of page of original certified Transcript of Record.

cargo of Superior barley per the French vessel "La Rochejaquelin"; that, on said 25th day of February, 1916, said F. Green & Co. filed in the office of said defendant in the said City of London, England, and prepaid all the charges then and there demanded by defendant, and said defendant then and there accepted and undertook to properly transmit and deliver a message to said plaintiffs in said City of San Francisco, in the words and figures following:

> Larochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton Sixty two and six not North Ipswich including war risk considerably best offer yet made this position.

V.

That said defendant transmitted and delivered said message with such lack of reasonable care and diligence and with such gross negligence that in the course of the transmission and delivery of said message it became altered and added to and was delivered to said plaintiffs on the said 25th day of February, 1916, in an altered form, to wit, in the words and figures following:

> Larochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton sixty two and six not North Ipswich not including war risk considerably best offer yet made this position. [2]

VI.

That said plaintiffs were without notice or reason to believe that the message so delivered to them as aforesaid was altered or incorrect or other than as

delivered by said F. Green & Co. to defendant for transmission and delivery; that said plaintiffs reasonably believed the said message, as delivered to them as aforesaid to be correct and unaltered, and in every respect the same as the message delivered by said F. Green & Co. to defendant in London for delivery as aforesaid; that said plaintiffs reasonably relied upon the contents of the said message so delivered to them as aforesaid as being the same terms as those contained in the message which F. Green & Co. had delivered to defendant for transmission and delivery to plaintiffs; that the message delivered by said F. Green & Co. to defendant for transmission and delivery to plaintiffs, as described and set out in Article IV above, did contain the true and correct terms of the offer it purported to set out; that said plaintiffs, reasonably relying upon the correctness of the contents of the message received by them as aforesaid, on the said 25th day of February, 1916, cabled the said F. Green & Co. in the said City of London, England, and in said cable directed the said F. Green & Co. to accept on behalf of plaintiffs the offer transmitted to them in the said message received by plaintiffs; that said F. Green & Co., on behalf of plaintiffs, did accordingly forthwith accept the said offer and bind said plaintiffs to a contract; that the material terms of said contract are as set out in the message delivered by said F. Green & Co. to defendant for transmission and delivery to plaintiffs as in Article IV hereof set forth.

VII.

That the contract which said plaintiffs became

bound to perform as aforesaid and which thereafter they did perform, contained as one of its terms the provision that plaintiffs must [3] provide war risk on the said cargo of Superior barley per "La Rochejaquelin"; that in consequence of defendant's lack of reasonable care and diligence and defendant's gross negligence in altering and adding to, or permitting an alteration in or addition to be made to during the course of transmission and delivery as aforesaid, the contents of the said message of F. Green & Co. to plaintiffs as aforesaid, contrary to the direction of said F. Green & Co., and in consequence of defendant's delivery to plaintiffs of a message different from the message which it had received, said plaintiffs reasonably believed that this particular term of the said proposed contract was the direct opposite of the term intended by said F. Green & Co. and by the makers of said offer, to wit, that the offerors as vendees proposed and offered to provide the said war risk on the said cargo of Superior barley.

VIII.

That the said term requiring plaintiffs to provide war risk on the said cargo of Superior barley placed a great burden and liability upon said plaintiffs, which plaintiffs did not wish to assume and would not have assumed had they known that defendant had altered the said message; that said plaintiffs would not have accepted said offer, or any offer of similar terms, or made any contract for the said cargo of Superior barley, had they been advised that the real offer as contained in the message de-

livered to defendant by F. Green & Co., contained the said objectional term as aforesaid; that the said plaintiffs would not have sold the said cargo of Superior barley to the said offerors, or to anyone, on the terms contained in their offer as set out correctly in the message delivered by F. Green & Co. to the defendant; that said plaintiffs authorized and directed said F. Green & Co. to enter into the said contract in said plaintiffs' behalf solely because of their being misled and deceived as to its correct terms by the act of defendant; that the [4] offer as correctly set out in the message delivered by F. Green & Co. to defendant did not represent a fair and reasonable compensation and return to said plaintiffs for said cargo of Superior barley; that, due to defendant's act as aforesaid in transmitting and delivering the said message from F. Green & Co. to said plaintiffs, said plaintiffs became obligated against their wish to provide war risk on the said cargo of Superior barley as a part of the said contract of sale, and said plaintiffs would not have permitted themselves to become so obligated and would not have become so obligated had it not been for the acts of defendant as aforesaid in transmitting and delivering said message as aforesaid, thereby misleading, misinforming and deceiving said plaintiffs as aforesaid.

IX.

That, at the time when plaintiffs made said contract for the sale of the cargo of said steamer, it was customary, prudent and commercially necessary to provide war risk on said cargo of said French ship

by taking out insurance thereon; that said plaintiffs so advised defendant and, before providing said war risk, notified said defendant of all the facts and circumstances surrounding the said matter, and called upon defendant to provide proper war risk, but that said defendant neglected and refused to supply the same; that said plaintiffs thereupon, in order to mitigate their damages, secured such insurance, to cover said war risk on said cargo; that said plaintiffs paid as a premium on the said insurance, the sum of Sixty-nine Hundred Seventy and 54/100 Dollars ($6970.54); that the said plaintiffs kept themselves informed as to the rates of insurance on war risks, and that the said premium so paid was reasonable and proper and the most favorable obtainable; that, in order adequately to protect the said cargo and to mitigate damages, it became reasonably necessary to take out the said insurance and pay the said premium on the 24th day of October, 1916. [5]

X.

That due to the acts of defendant as aforesaid in connection with the transmission and delivery of the said message accepted by defendant for transmission and delivery as aforesaid, said plaintiffs have been damaged as aforesaid in the said sum of Sixty-nine Hundred Seventy and 54/100 Dollars ($6970.54), together with interest from and after the said 24th day of October, 1916; that neither the whole nor any part of the said sum has ever been paid by defendant, though often demanded, and that the whole thereof is now unpaid and owing to said plaintiffs from said defendant.

WHEREFORE, plaintiffs pray for judgment against defendant in the sum of Sixty-nine Hundred Seventy and 54/100 Dollars (6970.54), with interest thereon from the 24th day of October, 1916, and plaintiffs' costs of suit, and for such other and further relief as may be meet and proper in the premises.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco,—ss.

James Rolph, Jr., being first duly sworn, deposes and says: That he is one of the plaintiffs in the within entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matter therein stated on information or belief, and as to those matters he believes the same to be true.

JAMES ROLPH, Jr.

Subscribed and sworn to before me this 22d day of March, A. D. 1917.

[Seal] S. I. CLARK,
Notary Public in and for the City and County of San Francisco, State of California. [6]

[Endorsed]: Filed Mar. 23, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

(Title of Court and Cause.)

Amended Answer.

Now comes the defendant and by leave of Court first had and obtained, files this its amended answer to the complaint of plaintiffs herein, and answers said complaint as follows:

I.

Answering paragraph I of said complaint, the defendant says that it has no information or belief sufficient to enable it to answer the averments, or any thereof, contained in paragraph I of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

II.

Answering paragraph V of said complaint, defendant denies that the said error alleged to have been committed in the course of the transmission of said message occurred through any gross negligence or lack of reasonable care or diligence of this defendant, but, on the contrary, says that such alleged error is one which may commonly occur in the transmission of unrepeated telegraph messages over long distances, as set forth in said complaint, notwithstanding the exercise of great diligence and care, and in this behalf defendant further alleges that said word "not" was inserted between the words "Ipswich" and the word "including" in the third line of said message, by slight inadvertence and oversight of the operator and by no greater degree of negligence or lack of care; that said inadvertence

or oversight was caused by the fact that the word "not" also occurred in the second line of said message between the words "two" and "East Southampton," being almost immediately above the point of the insertion of said word in the third line of [8] said message, and the repetition of said word was not observed by said operator.

III.

Answering paragraph VI of said complaint, this defendant denies that plaintiffs were without notice or reason to believe that the message so delivered to them as alleged in said complaint was altered or incorrect or other than as delivered by F. Green & Co. to defendant for transmission and delivery; but, on information and belief, alleges that said plaintiffs did not believe the said message so delivered to them to be correct and unaltered, or correct or unaltered, or in every respect the same as the message delivered by said F. Green & Co. to defendant in London for delivery, as alleged in said complaint; denies that the plaintiffs reasonably relied upon the contents of said message so delivered to them as being the same terms as those contained in the message which F. Green & Co. had delivered to defendant for transmission and delivery to the plaintiffs; denies that said plaintiffs in cabling said F. Green & Co., directing them to accept said offer transmitted to them in the said message received by plaintiffs, reasonably relied upon the correctness of the contents of said message, but, on the contrary, alleges that said plaintiffs had reason to believe that an error had been committed in the transmission of said

telegram and that said message so delivered to the plaintiffs in the form as set out in said complaint had been altered in the course of the transmission thereof and that said message was not in the same terms as those contained in the message which said F. Green & Co. had delivered to defendant for transmission and delivery to the plaintiffs, and in particular this defendant specifies and alleges in this behalf as follows: That on the 24th day of February, 1916, plaintiffs filed with this defendant at San Francisco and caused to be transmitted and delivered to said F. Green & Co. at London, England, a [9] message containing an offer to sell said cargo of superior barley referred to in said complaint, at the rate of 63 shillings, 9 pence, including war risk to be paid by seller; that in reply to said offer of sale, said message as set forth in paragraph V of said complaint, was delivered to the plaintiffs in San Francisco which, by the terms thereof the buyers declined said offer and purported to offer to purchase said cargo at the rate of 62 shillings with war risk to be paid by buyer, which offer for said cargo of barley was about the sum of $1,000 more than the offer which said buyers had declined and that said plaintiffs were then put upon inquiry by means of said messages as to whether or not said cablegram sued on in this action was correct; that defendant is informed and believes, and upon such information and belief alleges that said plaintiffs made no inquiry and took no steps to ascertain the correctness of said telegram, but accepted said offer, if the same was accepted by plaintiffs, with notice

and information that an error had been committed in the transmission of said message.

Further answering said paragraph VI of said complaint wherein it is alleged "that said F. Green & Co., on behalf of plaintiffs, did accordingly forthwith accept the said offer and bind said plaintiffs to a contract; that the material terms of said contract are as set out in the message delivered by said F. Green & Co. to defendant for transmission and delivery to plaintiffs as in Article IV hereof set forth," this defendant says that it has no information or belief sufficient to enable it to answer the aforesaid averments of said complaint, and basing its denial thereof upon that ground, denies that said F. Green & Co. on behalf of plaintiffs did accordingly or at all accept said offer or bind said plaintiffs to said contract, and denies that the material terms of said contract are as set out in said message delivered by said F. Green & Co. as set forth in said complaint, or that any contract accepting said offer was made for or on behalf of plaintiffs herein. [10]

IV.

Answering paragraph VII of said complaint, the defendant says that it has no information or belief sufficient to enable it to answer the averments, or any thereof, contained in paragraph VII of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

V.

Answering that portion of paragraph VIII of said complaint wherein it is alleged: "That the said

term requiring plaintiffs to provide war risk on the said cargo of superior barley placed a great burden and liability upon said plaintiffs, which plaintiffs did not wish to assume and would not have assumed had they known that defendant had altered the said message; that said plaintiffs would not have accepted said offer, or any offer of similar terms, or made any contract for the said cargo of superior barley, had they been advised that the real offer as contained in the message delivered to defendant by F. Green & Co., contained the said objectional term as aforesaid; that the said plaintiffs would not have sold the said cargo of superior barley to the said offerors, or to anyone, on the terms contained in their offer as set out correctly in the message delivered by F. Green & Co. to the defendant''; defendant says that it has no information or belief sufficient to enable it to answer said averments of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

Defendant further denies that the plaintiffs authorized and directed, or authorized or directed, said F. Green & Co. to enter into said alleged contract, if at all, in plaintiffs' behalf, solely because of their being misled and deceived, or misled or deceived, as to the correct terms thereof by the act of this defendant, and in this connection denies that plaintiffs were misled or deceived as to the correctness of said message, [11] but, on the contrary, alleges that the plaintiffs had ample and sufficient notice that an error had been committed in the

transmission thereof as hereinbefore in this answer more particularly set forth.

Defendant further denies that the offer, as correctly set out in the message delivered by said F. Green & Co. to defendant, did not represent a fair and reasonable, or fair or reasonable compensation and return to plaintiffs for said cargo of superior barley, but, on the contrary, alleges that said offer, as set out in the said message delivered by said F. Green & Co. and filed with this defendant for transmission, as set out in paragraph IV of said complaint, was a fair and reasonable offer and compensation and return for said cargo of superior barley, and was the full, fair and reasonable price therefor, and was much greater than the price which plaintiffs could at said time have obtained for said cargo of barley in the city of San Francisco, California, and in excess of the market value of said barley in the City of London, England, where said message was filed and where said sale is alleged to have been made.

Denies that due to the defendant's act, as alleged, in transmitting and delivering said message from said F. Green & Co. to the plaintiffs, the plaintiffs became obligated against their wish to provide war risk on said cargo of superior barley, as a part of said alleged contract of sale; denies that the plaintiffs were misled or deceived by the contents of said message, but, on the contrary, says that plaintiffs were by the contents of said messages referred to herein, put upon notice that an error had been committed in the transmission thereof, and alleges that

plaintiffs discovered and were fully advised of the error in the transmission of said message before the shipment of said cargo of superior barley pursuant to said alleged contract of sale, and before the war risk alleged in said complaint to have been paid was incurred, provided, or secured.

Answering that portion of paragraph VIII of said complaint wherein it is alleged, "and said plaintiffs would not have permitted [12] themselves to become so obligated and would not have become so obligated had it not been for the acts of defendant, as aforesaid, in transmitting and delivering said message as aforesaid," defendant says it has no information or belief upon the subject sufficient to enable it to answer the same, and basing its denial upon that ground, denies that plaintiffs would not have permitted themselves to become obligated and would not have become obligated to sell said cargo of superior barley for the price offered in said message, as filed by F. Green & Co. and set forth in paragraph IV of said complaint, had said error in the transmission of said message not been made.

VI.

Answering paragraph IX of said complaint, the defendant says, that it has no information or belief sufficient to enable it to answer the averments, or any thereof, contained in paragraph IX of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

VII.

Answering paragraph X of said complaint, defendant denies that due to the acts of defendant in connection with the transmission and delivery, or transmission or delivery of such message, as set forth in said complaint, or at all, said plaintiffs have been damaged in said alleged sum of $6,970.54, or in any sum whatever or at all, but, on the contrary, alleges that notwithstanding said alleged error in the transmission of said cablegram and the alleged acceptance thereof complained of, and the payment of said war risk, these plaintiffs, by the sale of said cargo of superior barley, received and derived a clear profit of $28,000, or thereabouts, after the payment of the cost of said cargo of barley and all freights, charges, insurance, war risk, and every other expénse connected with said transaction.

And for a further and separate defense the defendant alleges as follows: [13]

I.

That said message referred to in paragraph IV of said complaint and set forth therein, was filed with this defendant at its office in the city of London, England, on the 25th day of February, 1916, by F. Green & Co. as agents of the plaintiffs herein, for transmission over the submarine cable and telegraph system of the defendant and delivered to plaintiffs at San Francisco in the State of California; that said message was filed by said F. Green & Co. in reply to a telegraphic message sent to plaintiffs by said F. Green & Co. on the 24th day

of February, 1916, making an offer of sale of said cargo of superior barley referred to in the said complaint, and requesting an answer thereto. That said message so filed by said F. Green & Co. on the 25th day of February, 1916, was accepted by this defendant for transmission, as herein set forth, and subject to the terms and conditions of a certain contract in writing printed upon the back of said message, and not otherwise, which said contract and the terms and conditions thereof were agreed to by the sender thereof and these plaintiffs, and among which terms and conditions of said contract were the following:

"All important Telegrams should be repeated, for which an additional quarter rate is charged.

CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.

The Company will refund to the Sender the charges paid by him for any Telegraph which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the nontransmission or nondelivery of the Telegram, or delay, or error in the transmission or delivery thereof, however such nontransmission,

nondelivery, delay or error shall have occurred." [14]

That upon the face of said message was printed the following condition and contract subscribed and assented to by said F. Green & Co., the sender of said message, as hereinbefore set forth:

"Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph-Cable System, subject to the said conditions to which I agree.

F. GREEN & CO.

Signature—F. GREEN & CO.,

Address 13, Fenchurch Avenue, London, E. C."

II.

That by the Act of Congress entitled "An Act to Regulate Commerce, approved June 18th, 1910, (24 Stat. L. 379), relating, among other things, to telegraph companies and cable companies, communication by telegraph and cable between and among the several states and territories of the United States and to and from foreign countries, the Congress of the United States entered upon and assumed charge of regulating the field of communication by telegraph and cable between the several states of the United States and between foreign countries, and conferred upon the Interstate Commerce Commission full power over rates, charges, facilities, classifications and practices of such telegraph and cable companies in the transmission of interstate and foreign messages, and, in particular, conferred on the

Interstate Commerce Commission the power to approve, alter or acquiesce in existing rates and classifications, which power the said Commission has ever since retained and still retains. That by said Act of Congress it is specially provided that messages by telegraph subject to the provisions of said Act may be classified among other classes, into "repeated" and "unrepeated" messages, and that different rates may be charged for such different classes of messages. That by said Act it is further specially provided that all such messages shall be transmitted without discrimination, and without undue or unreasonable preference or advantage whatever for like service. [15]

III.

That pursuant to the provisions of said Act of Congress relating to the classification of telegraph messages between the different states of the United States and foreign countries, the defendant had on and prior to the 25th day of February, 1916, established classifications of such telegraph messages into the various classes referred to in said Act, and among others into repeated and unrepeated messages, and had established different rates of toll with respect to such different classes of messages and that in and by said contract hereinbefore referred to and set forth herein, under which said message referred to in said complaint was accepted and transmitted, it is provided and notice given to the sender thereof, that messages may be transmitted between the several states of the Union and foreign countries in the form of a repeated message

and for a higher rate of toll, in consideration of which such repeated message will be transmitted back from the office of destination to the point of origin. That the repetition of such messages is intended to correct possible errors therein in transmission thereof, by advising the office at the point of origin whether said message has been correctly transmitted; that had said message been filed by said F. Green & Co. as a repeated message, the error complained of would not have occurred and the liability of the telegraph company for errors or delays in the transmission or delivery of such messages is fixed in said contract; and it is further provided in said contract that a message may be received and transmitted at a lower rate of toll as an unrepeated message, which, except as to the amount received for sending the same, shall be received, transmitted and delivered at the risk of the sender thereof.

IV.

That the said Interstate Commerce Commission, prior to and at the times of the filing of the message sued on herein, [16] and prior to the commencement of this action, had full knowledge of the rates, charges and classifications of messages and the transmission and conditions thereof established by the defendant, as above described, and the terms and conditions of said contract herein set forth, and with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications, regulations or contracts, and recognized the reasonableness

thereof and the right of defendant to charge a higher rate for a repeated message and a lower rate for an unrepeated message as in said contract and stipulations provided.

V.

That said message sued on in this action was a foreign message to be sent from London, England, to a point in the State of California, and as such was interstate and foreign commerce and subject to the provisions of said Act of Congress hereinbefore referred to; that said message was filed, as herein alleged, and was an unrepeated message, and defendant was not directed or requested to repeat the same; but was requested by sender thereof to transmit said message as an unrepeated message; that defendant received for said transmission and delivery thereof the sum of ten dollars and no more, which sum was defendant's ordinary and reasonable charge for the transmission and delivery of said message as an unrepeated message, under the conditions set forth in said contract, and that said sum was the rate charged for those messages only which are transmitted at the risk of the sender, as in said contract provided; that by the terms of said contract, subject to the conditions of which said message was filed and accepted for transmission, defendant was not to be liable for any loss, injury or damage arising from any error in such transmission beyond the said amount received for sending such unrepeated message.

VI.

That by reason of the premises and the said Act

of [17] Congress and of said contract, rules and regulations made in pursuance thereof and subject to which said message in said complaint referred to was accepted, transmitted and delivered, defendant ought not to be liable in this action, or in any event beyond the sum of ten dollars, the amount for sending the same, with interest thereon from the 25th day of February, 1916, to the present time.

WHEREFORE, defendant prays that plaintiffs take nothing by this action and that defendant have judgment for its costs, but in no event that judgment be given for plaintiffs for a greater sum than ten dollars.

BEVERLY L. HODGHEAD,
Attorney for Defendant.
ALBERT T. BENEDICT, of New York,
Of Counsel.

State of California,
City and County of San Francisco,—ss.

M. T. Cook, being first duly sworn, deposes and says: That he is an officer of the Western Union Telegraph Company, defendant in the above-entitled action, to wit, the General Manager of the Pacific Coast Division thereof; that he has read the foregoing amended answer to said complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

M. T. COOK.

Subscribed and sworn to before me this 22d day of October, 1917.

[Seal] CHARLES E. REITH,
Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within amended answer is hereby admitted this 23d day of October, 1917, and it is hereby [18] stipulated that said amended answer may be filed.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 23, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

(Title of Court and Cause.)

(Stipulation as to Facts.)

IT IS HEREBY STIPULATED that the following are the facts of the case, to wit:

I.

That at all the times herein mentioned plaintiff George U. Hind was and now is a resident of the city of San Rafael, Marin County, said Northern District of California, and a citizen of the State of California; that at all of said times plaintiff James Rolph, Jr., was and now is a resident of the said city and county of San Francisco, said Northern District of California, and a citizen of the State of California; that at all of said times said plaintiffs George U. Hind and James Rolph, Jr., were and now are copartners doing a general shipping and

commission business in the said city and county of San Francisco, said Northern District of California, under the firm name and style of Hind, Rolph & Co., being duly authorized thereunto by the laws of the said State of California.

II.

That at all times herein mentioned defendant, Western Union Telegraph Company, was and now is a corporation and existing under and by virtue of the laws of the State of New York, and a citizen of the said State of New York.

III.

That at all times herein mentioned said defendant was organized for and regularly engaged in, among other things, the business of receiving, transmitting and delivering communications and messages for the general public for hire between various places and states within the United States, and between the city of London, England, and said places and states, including the receipt, transmission and delivery of communications and messages between the said city of London, England, and the [20] said city of San Francisco, for the general public for hire.

IV.

That prior to the 24th February, 1916, F. Green & Co. at London, England, were negotiating in behalf of plaintiffs for the sale of a cargo of Superior Barley per the French vessel "La Rochejaquelein."

V.

That on the 24th February, 1916, plaintiffs filed

with the defendant for transmission, and defendant accepted for transmission, and transmitted and delivered to said F. Green & Co. a message as follows:

> "Offer cargo Superior shipment ship 'La Rochejaquelein' sixty three shillings nine pence including war risk Charter extras account buyers subject immediate reply."

Meaning thereby that said F. Green & Co. were to offer for sale on behalf of plaintiffs a cargo Superior Barley to be transported on the ship "La Rochejaquelein," at sixty-three shillings and nine pence English money, per quarter, and that plaintiffs were to pay the war risk insurance upon said cargo.

VI.

That on the 25th February, 1916, said F. Green & Co. filed with the defendant in the city of London, England, and prepaid the charges then and there demanded by defendant, and defendant then and there accepted and undertook to properly transmit and deliver a message to plaintiffs in San Francisco, California, in the words and figures following:

> "La Rochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton sixty two and six not north Ipswich including war risk considerably best offer yet made this position."

Meaning thereby that the prospective buyers of said cargo declined the aforementioned offer, but made a counter offer subject to immediate reply to purchase the cargo of Superior Barley per ship

"La Rochejaquelein" at sixty-two shillings, if delivered not easterly of Southampton, and sixty-two shillings and six pence, English money, if delivered not north of Ipswich, but that plaintiffs were to pay the war risk insurance thereon but no [21] charter extras.

VII.

That said last-mentioned message was on said 25th day of February, 1916, correctly transmitted by defendant over its cable to the city of New York, and there transferred to the land lines of defendant for transmission and delivery to plaintiffs at San Francisco; that in transmitting said message over said land line, defendant inserted the word "not" between the words, "Ipswich" and "including," and it was delivered to plaintiffs in San Francisco, so altered, on the 25th February, 1916, reading as follows:

> "La Rochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton sixty two and six not north Ipswich not including war risk considerably best offer yet made this position."

That by the insertion of the word "not" between the words "Ipswich" and "including," the meaning of said message was altered so as to convey to plaintiffs the offer that said buyers, and not the plaintiffs were to pay the war risk insurance thereon.

VIII.

On said 25th February, 1916, plaintiffs, relying upon the offer made in the message received, filed

with defendant for transmission to said F. Green & Co., London, and defendant accepted, transmitted and delivered to said F. Green & Co., a message as follows:

> "Offer accepted cargo Superior shipment ship "La Rochejaquelein" provided you and our London bankers Lazard Freres consider buyers first class See them Must be no question about buyers' responsibility."

Meaning thereby that the plaintiffs accepted the offer as received by them as set forth in paragraph VII.

IX.

On the 25th February, 1916, said F. Green & Co. filed with defendant for transmission to plaintiffs, and defendant transmitted and delivered to plaintiffs the following message:

> "La Rochejaquelein sale confirmed Buyers Ipswich Malting Company." [22]

Meaning thereby that the sale so confirmed was that contained in the message set forth in paragraph VI, for sixty-two shillings and six pence per quarter.

X.

That plaintiffs thereafter delivered to said Ipswich Malting Company, the purchasers of said cargo, 15,105.50 quarters of Superior Barley per ship "La Rochejaquelein," upon which sale the plaintiffs received and made a profit of $30,000.

XI.

That there was no particular market price for Superior Barley on or about the 25th February,

1916, but the price stated on said message set forth in paragraph VI, was the best price which said F. Green & Co. could secure at that date.

XII.

That George U. Hind, one of the plaintiffs, if called as a witness, would testify that plaintiffs would not have accepted said offer set forth in the message set forth in paragraph VI, whereby plaintiffs were to pay said war risk insurance, had said message been transmitted to plaintiffs as filed by said F. Green & Co.

XIII.

That by reason of the acceptance aforesaid of the offer contained in the message as set forth in paragraph VII, the plaintiffs were thereafter required to and did pay the premium on the war risk insurance, amounting to $6970.54 on the 24th day of October, 1916, which amount was the reasonable cost of such insurance.

XIV.

That said message referred to in paragraph VI hereof was filed with defendant at its office in London, England, on the 25th day of February, 1916, by F. Green & Co. as agents of the plaintiffs herein, for transmission and delivery over the submarine cable and telegraph system of the defendant to plaintiffs at San Francisco in the State of California; and upon the back of said message was printed the following condition and contract subscribed by said F. Green & Co., [23] the sender of said message, as hereinbefore set forth;

"Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph-Cable System, subject to the said conditions to which I agree.

F. GREEN & CO.

Signature F. GREEN & CO., Address 13, Fenchurch Avenue, London, E. C."

Upon the back of said message appeared the following:

"All important Telegrams should be repeated, for which an additional quarter rate is charged.

CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH SYSTEM.

The Company will refund to the Sender the charges paid by him for any Telegram which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the nontransmission or nondelivery, of the Telegram, or delay. or error in the transmission or delivery thereof, however such nontransmission, nondelivery, delay or error shall have occurred."

XV.

That the Court may take judicial notice of the Act of Congress entitled, "An Act to Regulate

Commerce, approved June 18th, 1910 (24 Stat. L. 379), relating, among other things, to telegraph companies and cable companies, communication by telegraph and cable between and among the several states and territories of the United States and to and from foreign countries, and of the rules and regulations of the Interstate Commerce Commission adopted pursuant thereto, and of the laws of the Kingdom of Great Britain and Ireland.

XVI.

That pursuant to the provisions of said Act of Congress relating to the classification of telegraph messages between the different states of the United States and foreign countries, the defendant had on and prior to the 25th day of February, 1916, established classifications of such telegraph messages into the various classes referred to in said Act, and among others, into repeated and unrepeated messages, and had established [24] different rates of toll with respect to such different classes of messages, and had filed said rates and regulations with said Interstate Commerce Commission.

XVII.

That said message was filed, as herein alleged, and was an unrepeated message, and defendant was not directed or requested to repeat the same; that defendant received for said transmission and delivery thereof the sum of ten dollars and no more, which sum was defendant's ordinary and reasonable charge for the transmission and delivery of said message as an unrepeated message, under the conditions set forth in said contract.

XVIII.

All legal objections are hereby reserved to the relevancy or materiality of any fact or testimony herein contained, and an exception to any ruling thereon is hereby reserved; upon the foregoing stipulation of facts each party does hereby move the court to enter a judgment in its favor, upon the grounds stated in the briefs respectively, and does hereby reserve an exception to an adverse ruling thereon; and each party does hereby request special findings.

XIX.

That on said 25th February, 1916, the rate of exchange between English money and money of the United States of America was one English pound of twenty shillings for $4.76.

ANDROS & HENGSTLER,
F. E. BOLAND,
Attorneys for Plaintiff.
BEVERLY L. HODGHEAD,
Attorney for Defendant.

Approved.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed May 25, 1920. Walter B. Maling, Clerk. [25]

(Title of Court and Cause.)

(Stipulation as to Certain Facts.)

It is stipulated that the condition and contract referred to in section XIV of the stipulation of facts heretofore filed herein, is that contained on a printed form or blank; and that a copy of said printed form or blank is attached hereto and made a part hereof, consisting of two sheets, each of which represents one side of said form or blank; and that said message referred to in said paragraph XIV was put upon one of said forms or blanks and so filed with defendant for transmission.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.
BEVERLY L. HODGHEAD,
Attorney for Defendant. [26]

Form 16.
No.

WESTERN UNION
ANGLO-AMERICAN—DIRECT UNITED STATES
CABLEGRAM

Prefix —— Code —— SENT. For Stamps.

Words. Charge At ———— This form will be accepted at all Post Office Telegraph Stations.

To —— By ——

VIA WESTERN UNION

To Prevent Mistakes Please Write Distinctly.

To "ROLPHGREEN,"
SAN FRANCISCO.

NOT TO BE TELEGRAPHED.

Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph-Cable System, subject to the said conditions to which I agree.

F. G. GREEN & CO.

Signature: F. GREEN & CO. Address: F. GREEN & CO., 13, Fenchurch Avenue, London, E. C.

Cable Addresses Registered in Any Part of the World, or With Any Company, are Available Over the Lines of the Western Union Telegraph-Cable System. [27]

THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.

The Largest Telegraph and Cable System in Existence.

8 DUPLEXED ATLANTIC CABLES.

OVER 25,000 OFFICES AND 1,500,000 MILES OF WIRE.

Direct Wires from Cable Stations to all the principal commercial centres in Great Britain, United States and Canada, and Direct connection with Central America, West Indies, South America, Australia, New Zealand, Fanning, Fiji, and Norfolk Islands.

DIRECT AND EXCLUSIVE CONNECTION WITH MEXICO.

RECEIVING OFFICES IN THE UNITED KINGDOM:—

		Telephone Nos.
LONDON:	1, Old Broad Street, E. C.	3761 Wall
	63, Old Broad Street, E. C.	3316 "
	48a, Gresham House, Old Broad St., E. C.	704 "
	142a, Winchester H'se, Old Broad St., E. C.	1368 "
	21, Royal Exchange, E. C.	9117 "
	39, 40, Mark Lane, E. C. 1070, 1384 Avenue	3762 "
	East India Avenue, E. C.	3763, 614 Avenue
	The Baltic, St. Mary Axe, E. C.	976 " / 6974 Central
	34, Throgmorton Street, E. C.	1368 Wall
	1, Drapers' Gardens, E. C.	1830 Central
	109, Fenchurch Street, E. C.	1050 Avenue
	10, Holborn Viaduct, E. C.	4119 City
	Effingham House, Arundel Street, W. C.	1713 Gerrard
	34, 35, Southampton Street, Strand, W. C.	1155 "
	2, Charing Cross, S. W.	3598 "
	5, Royal Opera Arcade, Pall Mall, S. W.	2073 Central
	34, Victoria Street, S. W.	3716 Victoria

		Telephone Nos.
LIVERPOOL:	D. 6, Exchange Buildings / Cotton Exchange	2274 Central (Private Branch Exchange)
BRISTOL:	Canada House, Baldwin Street	309
BRADFORD:	10, Forster Square	771
DUNDEE:	1, Panmure Street	1351
EDINBURGH:	50, Frederick Street	400
GLASGOW:	23, Waterloo Street	771 Central (Private Branch Exchange)
LEITH:	Exchange Buildings	600
MANCHESTER:	31, Brown Street	1455
NEWCASTLE-ON-TYNE:	1, Side	1329
WEST HARTLEPOOL:	Exchange Buildings / Mainsforth Terrace	789

General Offices — 26, OLD BROAD STREET, LONDON, E. C.

Telephone No.: 5261 Wall (Private Branch Exchange).

PRINCIPAL CONTINENTAL OFFICES AND AGENCIES:

ANTWERP:	4, Avenue De Keyser.	MADRID:	Calle Valenzuela 10.
"	49, Canal des Recollets.	NAPLES:	Via Marina Nuova, 14/18.
AMSTERDAM:	4, Weesperzijde.	PARIS:	1, Rue Auber.
BARCELONA:	57, Calle Caspe.	"	37, Rue Caumartin.
"	96, Paseo de Gracia.	ROME:	49/50, Piazza di Spagna.
CHRISTIANA:	4, Prinsensgade.	STOCKHOLM:	Drottninggatan 3.
COPENHAGEN:	Vesterbrogade 19.	VIENNA:	IV. Stumpergasse, 48.
HAVRE:	118, Boulevard Strasbourg.	ZURICH:	Pelikanstrasse, 22.
HAMBURG:	4, Grosse Allee.		

The public are recommended to hand in their Telegrams at the Company's Stations, where free receipts are given for the amounts charged.

Telegrams for this Company's Cables are also received at all Post Office Telegraph Stations; but in order to insure transmission by the Western Union Telegraph-Cable System, the forms upon which Telegrams are written should be marked "Via Western Union," "Via Anglo," or "Via Direct." This indication is signalled free of charge.

Cable addresses are registered free of charge.

All important Telegrams should be repeated, for which an additional quarter rate is charged.

CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.

The Company may decline to forward the Telegram, though it has been received for transmission; but in case of so doing shall refund to the Sender the amount paid for the transmission of the Telegram.

The Company will refund to the Sender the charges paid by him for any Telegram which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the non-transmission or non-delivery of the Telegram, or delay, or error in the transmission or delivery thereof, howsoever such non-transmission, non-delivery, delay or error shall have occurred.

The control of the Company over the Telegram shall be deemed to have entirely ceased at any point where in the course of the transit of the Telegram to its destination it may be entrusted by the Company (and the Company shall have full power so to entrust the Telegram) to any other system, service, or line of telegraph for further transmission.

CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED BY THE POSTMASTER-GENERAL IF IT BE HANDED IN AT A PUBLIC TELEGRAPH OFFICE IN THE UNITED KINGDOM.

1. Either the Postmaster-General or any Telegraph Company or Foreign Government, by whom this Telegram is or would in the ordinary course of the Telegraphic Service be forwarded may decline to forward the Telegram although it has been received for that purpose; but in such case the amount paid for transmission shall be refunded to the Sender at his request.

2. Neither the Postmaster-General nor any Telegraph Company or Foreign Government, by whom this Telegram is or would in the ordinary course of the Telegraphic Service be forwarded, shall be liable to make compensation for any loss, injury, or damage arising or resulting from non-transmission or non-delivery of the Telegram, or delay, or error, or omission in the transmission or delivery thereof, through whatever cause such non-transmission, non-delivery, delay, error, or omission shall have occurred.

3. This Telegram shall be forwarded in all respects in accordance with the provisions of the Regulations made pursuant to the Telegraph Acts, 1863 to 1911, and the provisions of such Regulations § shall be deemed to be binding not only between the Sender and the Postmaster-General, but between the Sender and any Telegraph Company or Foreign Government by whom this Telegram is or would in the ordinary course of the Telegraphic Service be forwarded.

§ The substance of these Regulations will be found in the Post Office Guide. [28]

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 25th day of May, 1920, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, and counsel having stipulated that the cause stand submitted on an agreed statement of facts and on briefs to be filed, and the Court after due deliberation, having filed its opinion and ordered that judgment be entered in favor of the defendant and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs take nothing by this action and that defendant go hereof without day and that said defendant do have and recover of and from said plaintiffs its costs herein expended taxed at $ ——.

Judgment entered March 1, 1921.

WALTER B. MALING,
Clerk. [30]

(Title of Court and Cause.)

Opinion.

ANDROS & HENGSTLER, of San Francisco, Attorneys for Plaintiffs.

BEVERLY L. HODGHEAD, of San Francisco, Attorney for Defendant.

FRANCIS R. STARK, of New York, of Counsel.

RUDKIN, District Judge:

This is an action to recover damages for a mistake in the transmission of a telegram. A jury was waived and the cause submitted to the Court on an agreed statement of facts. From this agreed statement it appears that on and prior to the 24th day of February, 1916, F. Green & Co. of London were negotiating on behalf of the plaintiffs for the sale of a cargo of barley. On the latter date the plaintiffs wired Green & Co. offering the cargo at sixty-three shillings and nine pence per quarter including war risk insurance, meaning thereby that the plaintiffs would pay such insurance. On the following day the offer was rejected and Green & Co. submitted a counter offer of sixty-two shillings per quarter, if delivered not easterly of Southampton, and sixty-two shillings and six pence per quarter, if delivered not north of Ipswich, including war risk insurance, meaning thereby that the insurance should be paid by the plaintiffs as in the first offer. This message was transmitted correctly by cable from London to New York but in its transmission

by the defendant from New York to San Francisco the word "not" was inserted before the word "including war risk." Under the telegram as filed with the telegraph company for transmission, therefore, the plaintiffs were to pay the war risk insurance while under the telegram as delivered the insurance was to be borne by the purchaser or purchasers. This counter offer was accepted by the plaintiffs without [31] notice or knowledge of the mistake in the transmission of the telegram and the barley was sold and delivered to the purchaser. By reason of the mistake in the telegram the plaintiffs were afterwards compelled to bear and pay the war risk insurance amounting to Sixty-nine Hundred Seventy Dollars and Fifty-four Cents ($6,970.54), and the present action was instituted against the telegraph company to recover that amount.

Aside from the foregoing the only reference in the agreed statement to the damages sustained or the market value of the barley is the following: That the plaintiffs made a profit of Thirty Thousand Dollars ($30,000.00) on the sale of the cargo.

"That there was no particular market price for Superior Barley on or about the 25th February, 1916, but the price stated in said message set forth in paragraph VI, was the best price which said F. Green & Co. could secure at that date.

"That George U. Hind, one of the plaintiffs, if called as a witness, would testify that plaintiffs would not have accepted said offer set forth in the message set forth in paragraph VI, whereby plain-

tiffs were to pay said war risk insurance, had said message been transmitted to plaintiffs as filed by said F. Green & Co."

Paragraph VI referred to in the stipulation is the paragraph which contains the counter offer of Green & Co. as filed with the telegraph company for transmission. The agreed statement contains some other facts in reference to the failure to repeat the message but for reasons hereinafter stated I do not deem it necessary to consider that question. The plaintiffs contend that they are entitled to recover the amount of the war risk insurance paid by them, while the defendant contends that the plaintiffs have suffered no loss. This latter contention must be sustained. Surely the measure [32] of damages in this class of actions cannot be and is not the difference between what the seller receives for his property and what he thought he was going to receive. There is nothing in the record to indicate, even remotely, that the intending purchaser or any other purchaser would have paid more for the barley than was actually paid. And assuming that one of the plaintiffs would testify that the offer as made would not have been accepted, and assuming that such testimony was competent and that such was the fact there is nothing to indicate that the plaintiffs were damaged in any such sum or in any amount.

As said by the Supreme Court of this State in Acheson vs. Western Union Tel. Co., 96 Cal. 641, "No damage, unless nominal, necessarily resulted from the alleged breach of contract. There is

nothing to show that plaintiff suffered any loss because he did not buy the hops at the named price; he may have saved money by not making the purchase." Again, in Western Union Tel. Co. vs. Hall, 124 U. S. 444–454, the Court said: "If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not; or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold is altogether uncertain. If he had not done so, and had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of the action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase."

So here, there is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action or even up to the present day. On the other hand, if they would have held or [33] kept the barley for their own use there is nothing in the record to indicate that they could not have purchased barley of like kind and quality even at a less price than that actually received. In other words, for aught that appears in the record the plaintiffs may have profited greatly by the mistake.

For these reasons it seems apparent to me that the

plaintiffs have suffered no loss and that there can be no recovery. Possibly the plaintiffs are entitled to recover the amount paid for sending the telegram but no such issue is presented by the pleadings.

The finding of the Court is, therefore, for the defendant and judgment will be entered accordingly.

[Endorsed]: Filed Mch. 1, 1921. Walter B. Maling, Clerk. [34]

(Title of Court and Cause.)

Petition for Writ of Error.

The plaintiffs in the above-entitled action, feeling themselves aggrieved by the judgment entered on the first day of March, 1921, in said action, come now by Andros & Hengstler, their attorneys, and petition the above-entitled court for an order allowing said plaintiffs to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

And your petitioners will ever pray.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within petition is hereby admitted this 6th day of April, 1921.

BEVERLY L. HODGHEAD,
Attorney for Defendant.

[Endorsed]: Filed Apr. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

(Title of Court and Cause.)

Assignment of Errors.

Plaintiffs above named assign the following errors upon which they will rely upon the review on writ of error to the United States Circuit Court of Appeals, Ninth Circuit, of the judgment given by this Court in this cause:

The Court erred in deciding and adjudging in favor of defendant upon, and deducing from and making the following conclusions of law from, the agreed statement of facts placed of record by the parties herein, (the same being the agreed statement of facts mentioned and referred to in and by the judgment and opinion of the Court rendered in this case), viz:

I.

The Court erred in sustaining the contention of defendant that the plaintiffs have suffered no loss.

II.

The Court erred in deciding that in this case the measure of damages is not the difference between what the seller receives for his property and what he thought he was going to receive.

III.

The Court erred in deciding that there is nothing to indicate in this case that the plaintiffs were damaged in any such sum or in any amount.

IV.

The Court erred in deciding that for aught that appears in the record the plaintiffs may have profited greatly by the mistake of defendant.

V.

The Court erred in deciding that the plaintiffs have suffered no loss and that there can be no recovery.

VI.

The Court erred in giving and entering judgment for the [36] defendant in said action, and against said plaintiffs.

WHEREFORE, plaintiffs pray that the judgment of said Court be reversed, and that judgment be ordered in favor of the plaintiffs as prayed for in their complaint.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within assignment is hereby admitted this 6th day of April 1921.

BEVERLY L. HODGHEAD,
Attorney for Defendant.

[Endorsed]: Filed Apr. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [37]

(Title of Court and Cause.)

Order Allowing Writ of Error.

Upon the motion of Andros & Hengstler, attorneys for the plaintiffs in the above-entitled action, and

upon filing a petition for writ of error, together with an assignment of errors,

IT IS HEREBY ORDERED that a writ of error be, and is hereby, allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment entered herein on the first day of March, A. D. 1921.

Done in open court this 29th day of April, 1921.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Apr. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

(Title of Court and Cause.)

Stipulation as to Bill of Exceptions.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that for the purpose of making up a record to be used on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, the stipulation of agreed facts upon which said cause was submitted to the above-entitled court, may be inserted in said record to be used on writ of error in lieu of a bill of exceptions, and shall be considered as a bill of exceptions, and that no other bill of exceptions or proposed bill of exceptions shall be required to be filed by plaintiffs above named in order to prosecute said writ of error.

Dated at San Francisco, California, May 9th, 1921.

BEVERLY L. HODGHEAD,
Attorney for Defendant.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.

It is so ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 10, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

(Title of Court and Cause.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, George U. Hind and James Rolph, Jr., as principals, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto Western Union Telegraph Company, a corporation, defendant above named, in the sum of Three Hundred Dollars ($300.00), to be paid to the said Western Union Telegraph Company, a corporation, its successors, representatives or assigns, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated the 9th day of May, A. D. 1921.

WHEREAS the above-named plaintiffs have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the Southern Division of the Northern District of California, Second Division.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiffs shall prosecute said writ to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

IT IS EXPRESSLY AGREED by said surety that in case of a breach of any condition of this bond, the above-entitled court may, upon notice to said surety of not less than ten days, proceed summarily in the said action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and [40] award execution therefor.

GEO. U. HIND,
JAMES ROLPH, Jr.,
Principals.

NATIONAL SURETY COMPANY, (Seal)
Surety.

By F. J. CRISP,
Attorney in Fact.

The foregoing bond may be approved as to form, amount, and sufficiency of surety.

BEVERLY L. HODGHEAD,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

On this 9th day of May, in the year one thousand nine hundred and twenty-one, before me, John McCallan, a Notary Public in and for the city and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared F. J. Crisp known to me to be the person whose name is subscribed to the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said F. J. Crisp acknowledged to me that he subscribed the name of the National Surety Company thereto as Principal and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is hereby approved this 10th day of May, 1921.

WM. C. VAN FLEET,
Judge.

The premium charged for this bond is Ten Dollars per annum.

[Endorsed]: Filed May 10, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [41]

(Title of Court and Cause.)

Praecipe for Record on Writ of Error.

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error as follows:

Complaint.
Amended answer.
Stipulation as to facts.
Stipulation as to certain facts.
Opinion.
Judgment.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Stipulation as to bill of exceptions.
Bond on writ of error.
Writ of error.
Citation.
Praecipe.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 11, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,059.

GEORGE U. HIND and JAMES ROLPH,, Jr.,
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing forty-two (42) pages, numbered from 1 to 42, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $18.60; that said amount was paid by the plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 26th day of May, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [43]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between George U. Hind and James Rolph, Jr., plaintiffs in error, and Western Union Telegraph Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said George U. Hind and James Rolph, Jr., plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send this record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within

thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 10th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within writ of error is hereby admitted this 12th day of May, 1921.

BEVERLY L. HODGHEAD,
Attorney for the Defendant in Error.

[Endorsed]: No. 16,059. United States District Court for the Northern District of California, Second Division. George U. Hind and James Rolph, Jr., Plaintiffs in Error, vs. Western Union Telegraph Company, Defendant in Error. Writ of Error. Filed May 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [45]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Western Union Telegraph Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern

District of California, Second Division, wherein George U. Hind and James Rolph, Jr., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 10th day of May, A. D. 1921.

WM. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within citation on writ of error is hereby admitted this 12th day of May, 1921.

BEVERLY L. HODGHEAD,
Attorney for Defendant in Error.

[Endorsed]: No. 16,059. United States District Court for the Northern District of California, Second Division. George U. Hind and James Rolph, Jr., Plaintiffs in Error, vs. Western Union Telegraph Company, Defendant in Error. Citation on Writ of Error. Filed May 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

[Endorsed]: No. 3690. United States Circuit Court of Appeals for the Ninth Circuit. George U. Hind and James Rolph, Jr., Plaintiffs in Error, vs.

Western Union Telegraph Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed May 26, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3690

IN THE 12

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE U. HIND and JAMES ROLPH, JR.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
(a corporation),
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs in Error.

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No. 3690

IN THE

United States Circuit Court of Appeals

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GEORGE U. HIND and JAMES ROLPH, JR.,
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vs.

WESTERN UNION TELEGRAPH COMPANY,
(a corporation),
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

This case is submitted upon the pleadings and a stipulation of the facts. It depends upon pure questions of law.

I. Statement of the Case.

Plaintiffs are co-partners engaged in a general shipping and commission business in San Francisco. At the time when this controversy arose plaintiffs were negotiating in London, by F. Green & Co.,

their agent in that city, for the sale of a cargo of Superior Barley to be sent from San Francisco to England, per the French vessel "La Rochejaquelin." On February 25, 1916, F. Green & Co. filed in the office of defendant, at London, a cablegram to plaintiffs at San Francisco, advising, as far as the purposes of this case are concerned, that buyers

> "Offer subject immediate reply 62 not east Southampton 62.6 not north Ipswich *including war risk* considerably best offer yet made this position."

(meaning an offer of sixty-two shillings per quarter if delivered not easterly of Southampton, and sixty-two shillings and six pence per quarter, if delivered not north of Ipswich, the insurance against war risk to be paid by plaintiffs).

Defendant company, in transmitting the message, altered the same, so that it was delivered to plaintiffs in San Francisco reading that the buyers

> "Offer subject immediate reply 62 not east Southampton 62.6 not North Ipswich *not including war risk* considerably best offer yet made this position."

By thus converting the words "including war risk" into "*not* including war risk" the telegram conveyed to plaintiffs the offer that the BUYERS would pay the war risk insurance on the cargo. Plaintiffs accepted the offer as received by them, by cabling: "Offer accepted," and the sale was confirmed on the same day by a message sent by F. Green & Co. to plaintiffs. They would not have ac-

cepted the real offer contained in the message filed in defendant's office at London, but were induced to sell the cargo by the cablegram received.

Plaintiffs received the 62s. 6d. per quarter, being the actual price offered in the message of F. Green & Co., but were compelled to pay the war risk insurance premium, amounting to $6970.54.

QUESTION INVOLVED.

Plaintiffs contend that the gross negligence of defendant in inserting the word "not" into the message and thereby reversing its meaning was the proximate cause of this loss; that without the cablegram plaintiffs would not have sold and transmitted their property, and would not have suffered the loss of the $6970.54.

The gravamen of the action is false representation and resulting damage, and defendant, in violation of its duty of reasonable care, falsely represented to plaintiffs that if they would part with their property, the buyers would pay the $6970.54; in reliance upon the truth of this representation plaintiffs parted with their property. Defendant is liable for the natural and probable consequences of its misleading act; the natural and probable effect of the false telegram was the expenditure by plaintiffs of the $6970.54.

II. Specification of Errors Relied Upon.

The Court erred in deciding that plaintiffs have suffered no loss or damage and giving judgment for defendant.

III. Brief of the Argument.

A. THE PLEADINGS AND AGREED FACTS CONSTITUTE A PRIMA FACIE CASE IN FAVOR OF PLAINTIFFS.

> "Proof of the delivery of the telegram in its altered form threw upon the Company the burden of showing that it had exercised the degree of care and diligence required of it by the law under which it was operating; that is to say, *great care and diligence.*"
>
> Ross J., in *Western Union Tel. Co. v. Cook,* 61 Fed. 624, 630.

B. THE DIRECT, NATURAL AND PROBABLE CONSEQUENCE OF THE FALSE TELEGRAM WAS THE EXPENDITURE OR LOSS BY PLAINTIFFS OF $6970.54.

1. The ruling principle is that

> "One who wrongfully deceives or misleads another to whom he owes the duty of truthful statement, to his damage, is liable for the natural and probable consequences of his act."
>
> *Bank of Havelock v. Western Union Tel. Co.,* 141 Fed. 522 (C. C. A.—8th).

Had the telegram been genuine, plaintiffs would have received, as the net equivalent of their property, $6970.54 more than they actually received.

The expenditure by plaintiffs of the $6970.54 was the natural and probable effect of the false representation made by defendant. Plaintiffs had fixed the price for which they were willing to sell their property; they would not have accepted an offer of a lesser sum (Stipulation XII). They had the right not to sell it. Then came defendant and said: If you will ship your property to England, the purchaser will pay the war risk premium. Plaintiffs, upon the faith of this representation, shipped the property to England, and, in consequence, became obligated to pay $6970.54. The obligation to pay this sum was the natural and probable effect of defendant's false statement that another party would pay it, if plaintiffs would ship the barley. On the assumption that the statements in the telegram were true and that plaintiffs had a right to give faith to them, it would have been unnatural not to accept the offer which met their fixed price; the natural effect of the false statement was to induce plaintiffs to ship their property and consequently incur the expenditure of $6970.54. This expenditure would not have been made, had the telegram spoken the truth. Every expenditure is prima facie a loss to the spender.

The rule as to the damages recoverable in such cases was stated in a case decided by the Circuit Court of Appeals, Fifth Circuit, in May, 1920.

The case referred to is

Western Union Tel. Co. v. Esteve Bros. & Co., 268 Fed. 22.

The Court said:

> "In the absence of a statutory or contractural modification of such liability the party in whose favor it is incurred, if there is a negligent failure to transmit the message correctly, is entitled to recover such damages as are *the direct and natural result* of the breach of duty, including *special damages which the terms of the message disclose to be likely to result from such a default.*"

What were the damages likely to result from inserting the word *"not"* into the instant message?

Had the message been sent correctly, the result would have been that plaintiffs would have kept their barley *and* the amount of the war risk premium.

The likely result of respondent's inserting the word "not" into the message was that plaintiffs would ship the barley and would thereby become obligated to pay the amount of the premium which, but for the respondent's default, they would not have been obligated to pay.

The actual result of respondent's default was that plaintiffs did ship the barley *and* did pay the sum of $6970.54, being the amount of the war risk premium.

Granting that plaintiffs lost nothing in price by shipping instead of keeping their barley, they did lose the $6970.54 paid as war risk premium as the direct and natural result of respondent's breach of duty.

2. It would be immaterial that plaintiffs might eventually have profited as the result of market conditions.

It does not lie in the mouth of the Telegraph Company, after it has caused this expenditure and loss to plaintiffs, to say that it is not liable to make compensation for the loss, because the plaintiffs might never have received from any other purchaser more than was actually paid; or, if they would have held or kept the barley for their own use, that its value might have diminished below the amount which they received as the net result of this transaction.

The District Court said:

> "There is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action or even up to the present day. On the other hand, if they would have held or kept the barley for their own use, there is nothing in the record to indicate that they could not have purchased barley of like kind and quality even at a less price than that actually received. In other words, for aught that appears in the record the plaintiffs may have profited greatly by the mistake."

We contend that the possible profit made by plaintiffs on the whole transaction is a false quantity in the case; that *defendant's liability would not be defeated* even if it appeared as a fact that plaintiffs could never thereafter have obtained a higher net sum as the result of a sale, had they wished to sell the barley, or that they could thereafter have purchased barley of the like kind and

quality even at a less price than that actually received, so that eventually they might have profited by defendant's false representation.

Assuming that plaintiffs held the barley for sale only, and that the market had dropped after February 25, 1916, so that plaintiffs eventually profited by the sale made in pursuance of the inducement held out by defendant, the cause of the ultimate profit would have been the fortuitous condition of the market for which defendant could claim no credit. Defendant is responsible for the natural consequences of its act; any possible profit made, in spite of its wrongful act, would not be the natural consequence of the false statement of defendant, nor would any loss which plaintiffs might have suffered, if the telegram had made a true statement, be the result of the telegram. On the contrary, it would have been an improbable and unnatural consequence of the false representation contained in the telegram received that the plaintiffs would be saved an indefinite sum of money by acting upon it. Certainly the direct result of the message was to cause plaintiffs to incur the expenditure of the war risk premium; certainly defendant had no intention of inducing plaintiffs to make this expenditure from any humanitarian motive that plaintiffs, if they did not act upon the message, might eventually lose more than the amount of the war risk premium.

The argument used by defendant and adopted by the lower Court may be placed in its proper light by the following analogy:

Supposing A inflicted a wound upon B with intent to commit an assault. The curing of the wound results in curing a previous weakness in B so that, after the wound is healed, B is stronger than he was before and the assault eventually proves beneficial to B. Or suppose that, as a result of the wound, B is confined to bed, instead of attending to his business in his office on Wall Street. During business hours the office is bombed and destroyed. Could A claim credit, respectively, for having benefited B's health or saved his life?

The proximate consequences of defendant's wrong was the expenditure by plaintiffs of the amount of money which they would not have expended if defendant's statement had been true; the loss suffered thereby is not cured by the possibility that plaintiffs might have suffered a greater loss under possible adverse future conditions which have no causal connection with defendant's act. Plaintiffs would have saved $6970.54, but for defendant's wrongful act.

3. Even if eventual contingent profit were a material fact, it would be matter of defense, the burden being upon the Telegraph Company.

Assuming that plaintiffs' prima facie case could be affected materially by the question, whether "the intending purchaser or any other purchaser would have paid more for the barley than was actually paid," the burden of showing the fact (if it be a fact) that plaintiffs could not have obtained a higher price for the barley, or that plaintiffs could

have purchased barley of like kind and quality even at a less price than was actually received, is upon the defendant. Plaintiffs had the right, either to keep their property for their own use, or to sell it on their own terms.

In case defendant, instead of making a false statement to plaintiffs, had made a true statement, the consequences would have been:

(a) The proximate consequences:

1. Plaintiffs would not have shipped their property, and
2. Plaintiffs would not have expended the $6970.54.

(b) The uncertain, possible future consequences would have been, in the alternative:

1. Plaintiffs would never have sold, but would have kept the barley for their own use.
2. Or plaintiffs would have sold at a future time in a favorable market, received their fixed net price, and saved the war risk premium. In that case they would have been richer by at least $6970.54.
3. Or plaintiffs would have sold at a future time in an unfavorable market and received less than their price. The difference between the sum which they would then have received might have been less than the sum which they actually did receive by more than $6970.54, so that eventually the prima facie loss of the plaintiffs might have been converted into a benefit.

It follows from this that:

First: The false statement in the telegram induced plaintiffs to give up their right to keep the

property for their own use, or to sell it on their own terms, and caused them an expenditure or immediate prima facie loss of $6970.54.

Second: The contingency that circumstances in the future might have shaped themselves in such a manner that eventually the financial loss caused by the false statement of defendant would have been converted into a profit for plaintiffs, is in its nature remote and improbable; it could in no sense be considered a natural consequence of defendant's act.

Third: Even if it were so considered, it would be in the nature of a *defence* operating to overcome the proximate result of defendant's wrong-doing. In other words, the burden would not be on the plaintiffs to show "that the intending purchaser or any other purchaser would have paid more for the barley than was actually paid," (quoting the words of Judge Rudkin), but the burden would be on the defendant to show that no other purchaser would have paid more for the barley than was actually paid. If (again quoting Judge Rudkin) "there is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action," the result is (always assuming, without granting, that such a fact is material to the issue) that defendant has presented no defence to plaintiffs' prima facie case of loss.—The Court says that, "for aught that appears in the record, the plaintiffs may have profited greatly by the

mistake," but it is respectfully submitted that the record shows that plaintiffs, as a proximate result of the mistake, lost the sum of $6970.54, being compelled to expend that sum against their consent. In no sense could the plaintiffs ever have profited by the mistake, or as a legal consequence of the mistake; but if they profited in spite of it, the burden is upon defendant to show it. In the absence of any showing, plaintiffs' prima facie case stands.

4. Distinction between instant case and cases relied upon by the District Court.

The Court cites *Acheson v. Western Union Tel. Co.,* 96 Cal. 641.

In that case the telegram was sent to plaintiff, prospective *buyer* of hops. By reason of the negligence of the company, it was delivered to plaintiff erroneously worded. Had it been correctly worded, plaintiff *would have* bought and made a profit. The result of the negligence was apparently that he *lost this expected profit.* Under these circumstances the Supreme Court of this State said:

> "There is nothing to show that plaintiff suffered any loss because he did not buy the hops at the named price; he may have saved money by not making the purchase."

For all that appeared in the case, the plaintiff could have bought the hops cheaper from some other source. No special damages were shown. In the instant case, on the other hand, it appears that, as a result of the false statement, plaintiffs did

ship their property, and did pay the $6970.54. They would have done neither act, had they not been induced by the false cablegram. Paying the money was the tangible, direct and proximate result of the message. Every expenditure made is prima facie a loss to the party who makes it. An *actual payment* is very different from the *possible receipt* of money in the form of profits expected to be made; the non-receipt is not prima facie a loss to the disappointed party. Making an expenditure is doing something positive, the consequences whereof are capable of accurate measurement; the loss of an expected profit, on the other hand, is something in its nature negative, speculative and uncertain. One will probably save money by not making a purchase; but he will probably not save money by making an expenditure.

The Court also cites *Western Union Tel. Co. v. Hall,* 124 U. S. 444-454.

In that case the plaintiff directed another by telegram to make a purchase for him. Through the negligence of defendant telegraph company the purchase was *prevented.* Had it been made, the plaintiff *might have* made a profit by an immediate resale. The Court held that he could not recover this possible profit.

In the case cited the plaintiff *did not buy,* on account of the negligence of defendant; in the instant case the plaintiffs *did sell,* on account of the negligence of defendant. In the case cited the consequence of defendant's negligence was that plaintiff *did not act,* in the instant case it was that plain-

tiffs *did act.* In the case cited the question was: What *would or might* plaintiffs have gained if they had acted?—a question which could be answered only by speculation and conjecture. In the instant case the question is: What would plaintiffs have kept if they had not actually sold?—a question susceptible of a precise and immediate answer, viz.: They would have kept the $6970.54, which they expended in consequence of the false message.

The Supreme Court, in the Hall case, expressly animadverts upon this fundamental distinction between purely speculative and uncertain damages, such as it was then dealing with, and, on the other hand, an *actual loss,* such as is involved in this case, by saying (p. 458):

> "Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, *so as to mislead the party to whom it is addressed,* and *on the faith of which he acts* in the purchase or sale of property, *the actual losses* * * * are clearly within the rule for estimating damages."

In the case at bar the loss of the war risk premium is the identical loss which plaintiffs were seeking to avoid by selecting the proper buyer; it is the identical loss which they suffered as the result of defendant's misrepresentation. Defendant knew that this exact item, viz: the war risk premium was at stake between seller and purchaser; that the value of the word *"not,"* inserted in the cablegram, was the price of this insurance; hence when

defendant falsely told plaintiffs: "This buyer will pay the item if you ship to him," it might reasonably have contemplated that the loss to plaintiffs, when acting upon the false representation, would be the price to be paid by the plaintiffs for the war risk insurance.

5. Correct rule as to measure of damages.

The rule applicable to the instant case is stated in *Jones, Telegraph & Telephone Companies,* § 565, as follows:

> "If one receives a message from his agent stating the price at which the property can be sold, but the price as delivered to the company is really less than that quoted in the received message, and he sells on the strength of the latter price, he may recover for the loss; and the measure of damages is *the difference between the price the property actually sold for and that which he thought he was getting for it,* or, as stated in another way, *the amount of his actual loss* caused by the decrease in the price he obtained.

In *Reed v. Western Union Tel. Co.,* 135 Mo. 661, 34 L. R. A. 492, plaintiff received a telegram from her agent and was misled by it into authorizing her agent to sell her property for $1300, when she believed from the telegram that she was obtaining $1900 therefor. She sued for $600 damages. The company contended that the damages claimed were not the proximate result of its negligence; but the Court said:

> "Plaintiff was led to believe she was offered $1900 for her property. Being willing to

> part with it for that sum, she wired acceptance of the proposition made. The proposal was only $1300, but in this way she was made to accept that proposal. Her agent was clothed not only with apparent, but actual, authority to sell for $1300, so far as he was advised. Being thus empowered to sell, he made a binding contract * * * The deed was forwarded and he delivered it. All this was done upon reliance on the correctness of defendant's action. *Could a more natural consequence ever follow a transaction than this loss did upon the mistake of defendant?* Does it lie in defendant's mouth to speculate how plaintiff or her agent, by the exercise of care, which it failed to exercise, *might have avoided* her contract with the purchaser?"

A fortiori in the case at bar: Could a more natural consequence ever follow a transaction than this loss of $6970.54 did upon the mistake of defendant? Does it lie in defendant's mouth to speculate how this loss, actually incurred when the premium was paid, *might have been offset by a fortuitous change in the market,* which, had it occurred, would have no causal connection with defendant's act, and for which defendant would have no more right to claim a credit than any other stranger?

In *Hollis v. Western Union Tel. Co.* 18 S. E. 287 (Ga. 1893), the message delivered to the telegraph company quoted the selling price of melons at $12. As delivered to the plaintiff by the telegraph company, the selling price was quoted at $20. Induced by this error in the message plaintiff sent a ship-

ment of melons forward to Atlanta for sale. The Court said:

> "As the message was acted upon by Hollis, he had a right to expect that the market in Atlanta was as the message which he received represented it. As it was not so in fact, his damage would be measured by *the difference between the market he had a right to expect and the one which actually existed* (provided his loss amounted to that much)."

In the instant case the market which plaintiffs had a right to expect, in reliance upon defendant's representation, was the net price set upon their goods by them; the market which actually existed was the net price set upon their goods by them *less the amount of the war risk premium.* The difference between the market plaintiffs had a right to expect and the market which actually existed was the amount of the war risk premium, being the sum of $6970.54. Truly, could a more natural or more certain consequence ever follow a transaction than did this loss upon the false representation of defendant?

The judgment of the District Court should be reversed, and judgment be ordered in favor of plaintiffs as prayed for in their complaint.

Dated, San Francisco,
September 26, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
Attorneys for Plaintiffs in Error.

No. 3690

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GEORGE U. HIND and JAMES ROLPH, Jr.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY (a corporation),
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division

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BEVERLY L. HODGHEAD,
Attorney for Defendant.

FRANCIS R. STARK,
Of New York,
Of Counsel.

Press of The James H. Barry Co.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division

The action is for damages for error in the transmission of a telegram relating to the sale of a shipload of barley. A jury was waived and the cause submitted to the Court upon an Agreed Statement of Facts. Judgment was rendered for the defendant.

The defenses are:

(1) Plaintiffs sustained no loss.

(2) Plaintiffs had cause to know of the error in the message before accepting the offer.

(3) Plaintiffs are bound by the terms and conditions of the message contract and established regulations as to limited liability.

STATEMENT OF FACTS

Plaintiffs, who were grain merchants at San Francisco, were negotiating in February, 1916, with Green & Co., their agents in London, England, respecting the sale of a shipload of barley. On February 24 they sent a message from San Francisco to Green & Co., London, offering a cargo at 63s. 9d. per quarter, including the war risk insurance, meaning thereby that the plaintiffs, the sellers, would pay such insurance (Agreed Statement, Par. V, Trs., p. 25). The cargo consisted of 15,105 quarters of barley of 448 pounds each. Exchange at that time being $4.76 per English pound (Agreed Statement, Par. XIX), this offer, if accepted, would have yielded plaintiffs $229,180 gross or *$222,210* net, after paying the war risk of $6,970. Green & Co. replied by the message of February 25th, being the message in suit, by which they stated to plaintiffs that *buyers declined the offer,* but submitted a counter offer to purchase the barley for 62s. 6d. including the war risk, meaning thereby that such insurance should be paid by the plaintiffs as in the first offer. This message is set out in Paragraph VI of the Agreed Statement, Trs., p. 25. The message was correctly transmitted by cable from London to New York, but in its transmission over the lines of defendant from New York to San Francisco the word "not" was inserted before the words "including war risk," indicating to the plaintiffs that the war risk would be paid by the buyers. At 62s. 6d. per quarter the cargo (provided

the war risk were paid by the buyers), would have yielded plaintiffs $224,686, or $2456 more than plaintiffs asked for the barley. The message as delivered thus made the buyers' offer also appear to be greater than the price which in the same message they declined. The plaintiffs without inquiry accepted this counter offer and received the price of 62s. 6d., from which, however, they were required to pay the war risk of $6970.54. This price received yielded plaintiffs a net profit of $30,000 on the cargo after allowing for the payment of the war risk insurance (Agreed Statement, Par. X).

It was further stipulated as follows with respect to the price actually received by the plaintiffs (See Agreed Statement, Par. XI):

> "That there was no particular market price for Superior Barley on or about the 25th of February, 1916, but the price stated on said message set forth in Paragraph VI, *was the best price which said F. Green & Co. could secure at that date.*"

The message in suit was written on one of the regular blanks of the Western Union Telegraph Company, used in transmitting cablegrams, which defined the conditions under which the message was received for transmission and described the rates, liability and obligation of the defendant, *to which conditions the plaintiffs, through their agent, agreed* (Par. XIV of Stipulation). Among other terms in this contract was the condition that the company should not be

liable beyond the amount paid for sending the same for any loss or damage resulting through error in the transmission of the message. It was further stipulated in the Agreed Statement, Par. XVI, that pursuant to the Act to Regulate Commerce, approved June 18, 1910 (24 Stat. L. 379), relating to the classification of telegraph messages,

> "the defendant had on and prior to the 25th day of February, 1916, *established classifications of such telegraph messages* into the various classes referred to in said Act, and among others, *into repeated and unrepeated messages,* and had established different rates of toll with respect to such classes of messages, and had filed said rates and regulations with said Interstate Commerce Commission."

It was further stipulated that said message was sent and paid for as an *unrepeated message* under the conditions set forth in said contract (Agreed Statement, Par. XVII).

I

AS TO THE DAMAGES

Plaintiffs cannot recover for an error where there was no loss. They received the highest price which the market afforded for the barley, notwithstanding the error, and they do not claim they could have sold it for more. On the contrary, it is stipulated that the price offered by the

true message of February 25th and which price was actually received by them "was the best price which said F. Green & Co. could secure at that date," and in the message itself plaintiffs' own agent, Green & Company, stated that such price was "considerably best offer yet made this position" (Agreed Statement, Par. VI).

It may be true, as contended by plaintiffs in error that they had a right not to sell their goods, but if this be true and the right not to sell were violated through defendant's error, plaintiffs can only recover what was lost as a result, and unless it appears there was a loss, there can be no recovery. Plaintiffs suffered no injury. The measure of damage is the difference between the price at which they sold and the price which they could have obtained for the barley had they not been misled by the message. But it is admitted that they received the highest market price. It does not appear they could have sold for more or that the barley was worth more. In fact plaintiffs have not shown, nor do they even contend, that they sustained any actual loss. Their contention is that they did not receive what by reason of the erroneous message they *expected to receive.* Their chief assignment of error is that

> "the Court erred in deciding that in this case the measure of damages is not the difference between what the seller receives for his property and *what he thought he was going to receive*" (Tr., p. 43).

We contend this would have been a false rule for the admeasurement of damage. If such were true then the defendant would be liable, not in the amount of the loss sustained by plaintiff but according to the magnitude of the error in the message regardless of the actual loss or the condition of the market, even though plaintiffs, as in this case, received the highest market price. If plaintiffs had received in this case what they expected from the erroneous message to receive, they would have obtained $2456 more for their barley than they asked for it. If the error in the message had chanced to be even more serious and have purported to offer $10,000 or $20,000 more than they obtained, then under plaintiffs' contention they would have been entitled to recover in damages this larger sum, not because they lost it, but because they expected it. Or, stating the case in another form, if another merchant had at that time been offered the same price of 62s. 6d. for a similar cargo of barley, but by error in the telegram had been led to believe that he was to receive $20,000 more for the barley than was actually offered, then, under the rule contended for, one merchant would recover $6970, and the other, under the same market conditions, would obtain a much larger sum in damages, although neither of them had sustained any loss.

Counsel contend, pages 7-8 of Brief, that the plaintiffs here can recover damages, even if it appear as a fact that plaintiffs could never have obtained a higher sum for the barley, or even if they could have re-

placed it by other barley of the same quality at a smaller price. It is urged that plaintiffs do not have to show an actual loss but only a *prima facie* loss, and that this is proven when it is shown that they did not receive what they *expected* to receive. But damages must be actual and certain. The burden of showing the actual loss is upon the plaintiffs. It is not shown that had it not been for the error, plaintiffs would have realized more than they did receive for the barley. The weakness of plaintiffs' claim is that they have singled out one item of expense among many in a general transaction, which they were required to pay, and allege that they were damaged in that amount, notwithstanding the fact that on the whole, the transaction proved fortunate.

PLAINTIFF'S AUTHORITIES

The cases cited to show that plaintiffs were entitled to recover on the basis of what "he thought he was going to receive" do not bear out that rule. If they did they would state an unsound principle of law. The citation from *Jones on Telegraph and Telegraph Companies* shows that the measure of damage is "the amount of *actual loss* caused by the *decrease* in the price he obtained."

The case of *Reed* vs. *Western Union,* 34 L. R. A. 492, cited by plaintiff, is in fact authority for defendant. The case clearly states that where by reason of an error in a telegram the plaintiff received less for her land than she expected to receive,

"We think the proper measure of damage under the circumstances was the difference between the *actual market value of the lot* and the price received by the mistake." (See page 498.)

In *Hollis* vs. *Western Union Telegraph Company,* 18 S. E. 287, counsel would have some support for his contention had the Court not gone on to say *"provided his loss amounted to that much."*

In this case it is not shown there was any loss at all. It was not shown that the market value of the barley was greater than the price received. Plaintiffs' rule finds no support in the authorities.

The pertinent part of the Opinion of the Court below in this cause, found at pages 38-42 of the Transcript, is as follows:

"There is nothing in the record to indicate, even remotely, that the intending purchaser or any other purchaser, would have paid more for the barley than was actually paid" (Tr., p. 40).

"So here, there is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action or even up to the present day. On the other hand, if they would have held or kept the barley for their own use there is nothing in the record to indicate that they could not have purchased barley of like kind and quality even at a less price than that actually received.

In other words, for aught that appears in the record the plaintiffs may have profited greatly by the mistake" (Tr., p. 41).

A case in all respects like the present one is found in the Supreme Court of Iowa, entitled *Micklewait* vs. *Western Union Tel. Co.,* 84 N. W. 1038.

Plaintiffs in that case were dealers in grain. A telegram was sent to them by one Russell offering to buy corn at 20½c per bushel. As delivered, the message read 21½c per bushel. Plaintiffs then purchased 18,200 bushels of corn for $3,658, for which they expected, at 21½c, to receive $3,913, but the real offer being but 20½c, they received only $3,731, which sale, however, yielded a profit of $73. The following language of the Opinion of the Court has direct application to our present case. The Court says:

"The mistake in the message caused them no loss of profits; for if it had been correctly transmitted they would have been in the same situation they now are. They obtained from Russell the exact price fixed in his message as it should have been sent. . . . It is wholly unnecessary to cite authorities to show that plaintiffs cannot recover damages without first showing some injury."

Plaintiffs in that case fully expected to derive a profit of $255, but the market conditions, that is, the price actually offered, yielded them a profit of $73,

which was all the corn was worth, and this they received, notwithstanding the error of the message. They were not permitted to recover more because they expected to receive more.

In the present case the plaintiffs in error derived a profit of $30,000 on the whole transaction after paying the war risk. They *expected* to derive a profit of $36,970, but this was $2456 more than they offered to sell for, and more than the offer which the buyers had declined, so that instead of sustaining an actual loss they, as in the Micklewait case, derived a large profit.

On the question of certainty of damages as applied to the facts here, the case of *Western Union Tel. Co.* vs. *Hall,* 124 U. S. 444, 31 L. Ed. 279, is instructive. The plaintiff on November 9th sent a message to his broker to buy 10,000 barrels of petroleum. The message should have been delivered by noon of that day, when the market price of oil was $1.17 per barrel. Through the negligence of the telegraph company the message was not delivered until 6 p. m. of that day, after the exchange had closed, and the next day the price had advanced to $1.35 per barrel. Plaintiff brought suit and recovered judgment in the lower Court for $1,800, being the difference in the two prices. This judgment was reversed by the Supreme Court, which held that plaintiff was entitled only to recover nominal damages. The Court said (p. 483):

> "All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."

In *Western Union* vs. *Waxelbaum,* 113 Ga. 1017, 56 L. R. A. 741, the plaintiffs sent a telegram inquiring the price at which they could buy eggs. A telegram in reply was sent, stating that the lowest price was 16½c. The message as delivered to plaintiffs read 15½c. On the faith of the telegram, as received, Waxelbaum ordered a shipment of eggs but was required to pay 16½c per dozen, the actual price at which they were offered. Suit was instituted to recover the difference from defendant. The Supreme Court said,

> "it is not satisfactorily shown that if the telegram had been properly transmitted plaintiffs would have received any more for the eggs than they did receive."

In *Acheson* vs. *Western Union Tel. Co.,* 96 Cal. 641, an error occurred in a message relating to the purchase of a lot of hops. Plaintiff alleged that by reason of the error he was prevented from buying 152 bales of hops at 8½c per pound, and was thereby damaged in the sum of $684. Judgment for plaintiff

was *reversed* because complaint did not state a cause of action. The Court said:

> "The gist of the action is for the recovery of special damages, and there is no allegation of special damage. Nominal damages only were recoverable on the complaint. If plaintiff suffered special damage by the failure to purchase certain hops, there should have been averments under which evidence of such special damage, and the facts upon which it rested, could have been introduced. No damage, unless nominal, necessarily resulted from the alleged breach of contract. *There is nothing to show that plaintiff suffered any loss because he did not buy the hops at the named price; he may have saved money by not making the purchase.*"

II

PLAINTIFFS HAD CAUSE TO KNOW OF THE ERROR IN THE MESSAGE BEFORE ACCEPTING THE OFFER

It is an accepted rule of law that the receiver of a message has no right to act upon it *if he has reasonable ground to suspect that the message has been altered or is in any other respects untrue.* The rule in this regard is stated by *Gray on Telegraphs* (Par. 76) as follows:

> "Where one who receives a telegram has reasonable ground to suspect that the message is

altered or in other respects untrue, he must, before acting upon it, assure himself, by repetition or other means, of its correctness. If without doing so he acts upon the telegram, which, as a matter of fact, is, owing to the negligence of the telegraph company, incorrect, he is guilty of contributory negligence, defeating his right of action. It is wholly immaterial, of course, whether his knowledge of the probability of error is derived from an ambiguity upon the face of the message or from other sources."

The price offered the plaintiffs by the message of February 25th, *as delivered,* being larger than the price at which plaintiffs had offered to sell, and more than the buyers in same message declined to pay, plaintiffs had sufficient and reasonable cause to suspect and even to know that there was an error in the cablegram, and it was their clear duty before acting upon the message, particularly in a transaction of such magnitude, to have the offer verified by a repetition of the message or otherwise. Their own negligence in thus acting upon the message, *which disclosed error upon its face,* contributed to the loss, if any, and will defeat plaintiffs' right of action. Buyers do not ordinarily offer more for goods than the seller asks for them. Here the seller by the first message offered the cargo of 15,105 quarters at 63s. 9d. or $15.17¼ per quarter, and agreed to pay the war risk of $6970. This would have yielded them, after paying the war risk, $22,210. The buyers, through the message of

February 25th, declined this offer but, according to the message *as delivered,* made a counter offer, which would have yielded plaintiffs the net sum of $224,686. The mathematics of the case cannot be denied.

Exchange being $4.76, at the time, 63s. 9d. was equal to $15.17¼ and 62s. 6d. was equal to $14.87½.

15,105 quarters at $15.17¼ equals.....$229,180
Less war risk (to be paid by sellers).... 6,970

Sellers offer (net).....$222,210
15,105 quarters at $14.87½ equals.....$224,686

It will thus be seen that as the message was delivered it appeared to offer plaintiffs several thousand dollars more for their barley than they asked.

When the message was received by plaintiffs declining their offer but making a counter offer for $2456 more than plaintiffs asked and which the buyers, by the same message, declined to pay, plaintiffs might safely have assumed there was something wrong. Plaintiffs could have guarded against the risk of loss by having the message repeated, or, instead of answering as they did, "Offer accepted," etc. (Tr., p. 27), made the message read "Offer of 62s. 6d. not including war risk accepted."

THE CASES ON CONTRIBUTORY NEGLIGENCE

The rule as stated by *Gray on Telegraphs* was quoted above.

Jones on Telegraph and Telephone Companies (2d ed.) section 333, states the rule as follows:

> "But if there is anything in the message itself which would lead him (the addressee) to believe that an error had been made, or if there are any circumstances connected with it which, with reasonable prudence, would lead him to suspect that an error had been made, he will be guilty of contributory negligence if he fail to inquire into such information when the opportunity is afforded."

In *Croswell on Electricity,* at paragraph 431, the rule is stated thus:

> "It has been held that if a person receiving a telegraph message has extrinsic information which leads him to suspect that the telegraph message as received by him may be incorrect, he is guilty of contributory negligence if he acts upon the telegram without making any effort to ascertain whether or not it is correctly transmitted."

Under the subject of contributory negligence in relation to telegraphic messages, the following is the rule given in 37 Cyc. p. 1760:

> "As in other civil actions, plaintiff may be precluded from recovering damages by reason of

his own contributory negligence, as where in the case of a message incorrectly transmitted plaintiff assumes to interpret and act upon it, although as delivered to him it is unintelligible, *where he acts upon such a message without attempting to verify its correctness, although having reasonable cause to suspect* that it has been incorrectly transmitted."

In *Germain Fruit Co.* vs. *Western Union Tel. Co.,* 137 Cal. 598, the message was sent by plaintiff to Cornforth & Co., quoting a price of Riverside oranges at $2.60 per box. The message was changed in transmission and as delivered meant $1.60 a box. The addressee accepted the offer. The Court found that the price of oranges was so much greater than that named in the message that Cornforth & Co. *"had reason to believe there was a mistake" in the message and did not act in good faith in sending their orders for two carloads of the oranges without verifying the correctness of the message.* The Supreme Court said, page 601:

"That Cornforth & Co. did know the market price of Riverside oranges at Denver and at Los Angeles, which was considerably more than $1.60 per box, and *'sufficiently to put Cornforth & Co. on inquiry as to whether or not said telegram was correct and they made no inquiry and took no steps to ascertain the correctness of said telegram.'"*

It was held that this failure to inquire as to the correctness of an unrepeated message, where the con-

tents gave good reason to suspect error, was negligence sufficient to preclude the recovery of damages.

In *Willoughby* vs. *Western Union Tel. Co.,* 133 N. Y. Supp. 269, an agent for the owner and manager of a theater telegraphed his principal as follows:

> "Letters from Tennis. If he can arrange date for 'Grace George' probably April 7th will you accept the following terms. She to take the first six hundred dollars, you the next one hundred and fifty dollars, then seventy-five twenty-five. Must have a quick answer. Wire me."

A telegram came back from the principal to the agent which read as follows:

> "If she don't play Johnstown all right first one fifty."

Acting upon the latter telegram, the agent made a contract to play Grace George upon the terms named in the telegram sent by him, from which action on his part damage to his principal ensued.

The following is the reasoning of the Court upon the above facts:

> "The only telegrams seen by the agent were the two, the contents of which are above given. It seems quite apparent that the telegram of the principal is not in response to the telegram of the agent. While it contains the words 'All right,' which would signify that the terms mentioned were satisfactory, the propriety of drawing such

an inference therefrom is destroyed by the words 'first one fifty' in the original proposal either for Grace George or for the principal. It seems clear that a man of ordinary intelligence and prudence would have known at once from the reading of these two telegrams that the latter was not in response to the former, and did not authorize the contract to be made as proposed in the telegram of the agent and that some error had been made in the transmission of one or the other of the telegrams, or in the reading or the sending of one or the other by the principal. It was therefore a negligent act on the part of the agent to make the contract, having as his authority only the telegram received from his principal. Such negligence was the proximate cause of the injury done. It is immaterial, therefore, that there was negligence on the part of the defendant in transmitting the message from the agent to the principal, for the chain of causation between it and subsequent damage was broken by an intervening negligent cause sufficient in itself to accomplish the result which followed."

See, also, the following cases:

Manly Mfg. Co. vs. *Western Union Tel. Co.,* 105 Ga. 235, 31 S. E. 156;
Western Union Tel. Co. vs. *Wright,* 18 Ill. App. 337;
Hasbrouck vs. *Western Union Tel. Co.,* (Iowa) 77 N. W. 1034.

III

PLAINTIFFS ARE BOUND BY THE TERMS AND CONDITIONS OF THE MESSAGE CONTRACT AND ESTABLISHED REGULATIONS AS TO LIMITED LIABILITY

The message in suit was an *unrepeated message* written on one of the regular blanks of the telegraph company used for transmitting cablegrams. It was sent subject to the conditions as to rates and liabilities printed thereon, to which the plaintiffs, through their agent, expressly agreed. On the face of the message was written the separate agreement signed by Green & Co. as follows:

> "Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph Cable System, *subject to the said conditions to which I agree.*
>
> F. GREEN & CO."
>
> Signature F. Green & Co., Address 13 Fenchurch Avenue, London. E. C. W.

The conditions referred to in the above are set out upon the back of the message, found in Paragraph XIV of the Stipulation and are as follows:

> "All important Telegrams should be repeated, for which an additional quarter rate is charged.
>
> "CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.

"The Company will refund to the Sender the charges paid by him for any Telegram which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

"The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the non-transmission or non-delivery of the Telegram, or delay, or error in the transmission or delivery thereof, however such non-transmission, non-delivery, delay or error shall have occurred."

The defendant received for the transmission and delivery of this message

"the sum of $10 and no more, which sum was defendant's ordinary and reasonable charge for the transmission and delivery of *said message as an unrepeated message, under the conditions set forth in said contract*" (Par. XVII of Stipulation).

It is here stipulated by the parties to this action that the message was sent *"under the conditions set forth in said contract."* By the terms of the contract defendant was not to be held liable for error beyond the amount paid for the transmission. The rate paid was based upon this measure of liability.

THE VALIDITY OF THE CONTRACT

There was formerly much conflict in the opinions of the Courts respecting the validity of these stipulations. The recent decisions of this Court and of the Supreme Court of the United States make it unnecessary to review the earlier opinions. The message was sent in interstate commerce and is controlled by the provisions of the Interstate Commerce Act, as amended June 18, 1910. (U. S. Compiled Statute, Secs. 8563, et seq.) It is there provided that messages by telegraph, etc., may be classified into *repeated and unrepeated messages, and such other classes as are just and reasonable, and different rates may be charged for different classes of messages.* It is further provided, Sec. 8565, that no carrier subject to the provisions of the Act shall give "any undue or unreasonable preference or advantage," etc. This Court, in the recent decision of *Czizek* vs. *Western Union Telegraph Co.,* 272 Fed. 223, had occasion to deal with these provisions of the law and to review the decisions of the Supreme Court of the United States in *Postal Telegaph-Cable Co.* vs. *Warren Godwin Lumber Co.,* 251 U. S. 27, and *Western Union* vs. *Boegli,* 251 U. S 215, and the decision of the Interstate Commerce Commission in *Cultra* vs. *Western Union Tel. Co.,* 44 I. C. C. R. 670, approved by the Supreme Court. In all those cases the validity of the stipulations relating to unrepeated messages was affirmed. This

Court in the Czizek case decided such stipulations could not be held to apply to a case of non-transmission or a total failure to place the message in course of transmission. But here the error was an error of transmission occurring on the land lines of the defendant between New York and San Francisco.

ESTEVE BROTHERS CASE

Since the decision of this case in the Court below, the Supreme Court of the United States has decided the case of *Western Union* vs. *Esteve Bros.* (June 1, 1921), No. 16 Adv. Op., p. 653, reversing the Opinion of the Circuit Court of Appeals for the Fifth Circuit. We may safely rest the decision of this case upon that authority. There, as in this case, the suit arose from an error in an unrepeated cable message. The message originated in Spain and was transmitted correctly by the Western Union over its cable to New York and thence over its land lines to New Orleans. The message, as filed, directed the sale of 200 bales of cotton. It was so changed in transmission as to direct the sale of 2000 bales of cotton. The error in transmission occurred on the land lines of the Western Union between New York and New Orleans. The message was an unrepeated message. The plaintiffs in filing the message did not in fact assent to any limitations of liability at all. They did not use the blank containing the provisions so limiting the liability and had no actual knowledge of the filing of

the tariffs with the Interstate Commerce Commission. The Agreed Statement of Facts in the present case (Par. XVI, Trs. p. 30) shows that pursuant to the provisions of the Interstate Commerce Act the defendant here had established various classes of messages referred to in the Act and among others into *repeated* and *unrepeated messages,* and had established different rates of toll with respect to such different classes of messages and had filed such rates and regulations with said Interstate Commerce Commission. In the *Esteve* case, plaintiffs contended, and it was held by the Circuit Court of Appeals, that they were entitled to a verdict for the full amount of their loss. The Company contended that since the message had not been repeated, the judgment should be for the amount of the tolls. This contention was upheld by the Supreme Court. The Supreme Court says:

> "The question presented for our decision is whether, since the amendment of June 18, 1910, to the Act to Regulate Commerce, the sender is without assent in fact bound as a matter of law by the provision limiting liability, because it is a part of the lawfully established rate."

The Act permits the telegraph company to establish rates and classifications but does not require them to be filed. The Court says:

> "But the rate, long before established, then formally adopted and filed, was thereafter the

only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. *Postal Telegraph-Cable Co.* vs. *Warren-Godwin Lumber Co.,* 251 U. S. 27, 30, 64 L. ed. 118, 120, 40 Sup. Ct. Rep. 69; *Cultra* vs. *Western Union Telegraph Co.,* 44 Inters. Com. Rep., 670-674.

"The lawful rate having been established, the Company was, by the provisions of Section 3 of the Act to Regulate Commerce, prohibited from granting to anyone an undue preference or advantage over the public generally. For, as stated in *Postal Telegraph-Cable Co.* vs. *Warren-Godwin Lumber Co., supra,* 30, the 'Act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates.' If the general public, upon paying the rate for an unrepeated message, accepted substantially the risk of error involved in transmitting the message, the Company could not, without granting an undue preference or advantage, extend different treatment to the plaintiff here. The limitation of liability was an inherent part of the rate. The Company could no more depart from it than it could depart from the amount charged for the service rendered.

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common-law liability from which they might or

> might not extricate themselves, according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not, as before, a matter of contract, by which a legal liability could be modified, but as a matter of law, by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

The Court further says that both railroad and telegraph rates are initiated by the carrier and that the railroad rate does not have the force of law unless it is filed with the Commission, but

> "it (Congress) did not make filing with the Commission a condition precedent to the existence of a lawful telegraph and cable rate. *When, therefore, the Western Union initiated and established this reasonable rate the principle of equality and uniformity laid down in Section 3 required that it should have exactly the same force and effect as the rate initiated by a rail carrier and filed according to the provisions of Section 6.*"

The plaintiffs may attempt to invoke the rule of *U. P. R. R. Co.* vs. *Burke,* referred to in the above

case, and claim the Esteve Bros. case is not controlling because the stipulation in the message contract provided for no greater liability in the case of repeated than of an unrepeated message. But, says the Court, in the latter case (p. 656):

> "It is by no means clear that the rule of the Burke case—established for common carriers of goods—should be applied to telegraph and cable companies. See the *Primrose* case, 154 U. S., p. 14, 38 L. ed. 889, 14 Supt. Ct. Rep. 1098. In any event, it is not applicable here. The Western Union did not, as in the case of telegrams, offer to send cable messages upon a special valuation to be made by the sender and paid for by an extra charge 'based upon such value equal to 1/10 of 1 per cent thereof.' *But it offered alternative rates for repeated and for unrepeated cable messages.* This long-established classification was expressly recognized as just and reasonable for cable as well as for telegraph messages in the amendment made by the Act of June 18, 1910, to Section 1 of the Act to Regulate Commerce."

What the liability would be for an error in the case of a repeated message, this Court has no occasion to decide in this case. The facts in the Esteve Bros. case was in all respects similar to the circumstances of the present suit and that case is controlling on the issue of the validity of the agreement as to an unrepeated message. The Court says in the last paragraph (p. 656):

"The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security. Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored, by having the message repeated, to secure the greatest care on the part of the Company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the unrepeated rate that another special rate was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it."

The language of the above paragraph has direct application to the present case. The message here was one of "value and importance." The Company offered another special rate for messages of this character. The sender was advised that *"all important telegrams should be repeated, for which an additional quarter rate is charged."* The repeated rate, offering greater accuracy, was open to any one who wished to pay the extra amount for extra security. The repetition of the message in this case would have disclosed the error and avoided any possibility of loss. But by choosing the rate for the unrepeated message the sender accepted substantially the risk of error. As said by the Court in the Esteve Bros. case:

"The limitation of liability was an inherent part of the rate. The Company could no more depart from it than it could depart from the amount charged for the service rendered.". . .

"Uniformity demanded that the rate represent the whole duty and the whole liability of the Company."

We repeat the language of the Supreme Court in *Postal-Telegraph Co.* vs. *Warren-Godwin Lumber Co.,* 251 U. S. 27. See page 30, interpreting the Interstate Commerce Act as applied to the liability of the telegraph companies in respect to unrepeated messages. The Court says:

"In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.

"In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the

power thus given, limited, of course, by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.

"In the third place, as the Act expressly provided that the telegraph, telephone, or cable messages to which it related may be 'classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages,' it would seem unmistakably to draw under the Federal control the very power which the construction given below to the Act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that, as pointed out by the Interstate Commerce Commission (*Cultra* vs. *Western U. Teleg. Co.,* 44 Inters. Com. Rep. 670), from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest."

The Court further says that the question is "persuasively settled by the decision of the Interstate Commerce Commision in" *Cultra* vs. *Western Union Tel. Co.,* 44 I. C. Rep. 670, and by the "careful

Opinion of the Circuit Court of Appeal of the Eighth Circuit dealing with the same subject in *Gardner* vs. *Western Union Tel. Co.,* 231 Fed. 405, and by numerous and conclusive opinions of State Courts," which are cited in the opinion.

See also

Western Union Tel. Co. vs. *Boegli,* 251 U. S. 215

and the decision of this Court in

Czizek vs. *Western Union,* 272 Fed. 223.

THE DEGREE OF NEGLIGENCE

Plaintiffs in error may claim that the defendant in error is not absolved from liability by these stipulations because the error complained of amounted to gross negligence. Such contention was made in the lower Court. It is answered by the decision of the Supreme Court in the Esteve Bros. case, supra. Here the error consisted in the insertion of the word "not," which altered the meaning of the message, resulting in a change of price of approximately $7000. In the Esteve Bros. case the error consisted in the change of the words "200 bales" to "2000 bales," which resulted in a loss of $31,000. The error in the one case was no greater than the other.

Gross negligence arises where there is evidence of wilful misconduct or intentional wrong. The proof of error furnishes presumption of negligence but not of gross negligence. Where wilful or intentional wrong

is charged, or, in other words, where gross negligence is alleged, it must be proven. There must be proof of independent facts showing some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences. See

Williams vs. *Western Union,* 203 Fed. 140;
White vs. *Western Union,* 14 Fed. 710;
Jones vs. *Western Union,* 18 Fed. 717;
Hart vs. *Western Union,* 66 Cal. 584;
Redington vs. *Pacific Postal Co.,* 107 Cal. 317;
Coit vs. *Western Union,* 130 Cal. 567.

In the Redington case the language of the Court is as follows:

> "The onus, then, of proving wilful misconduct or gross negligence on the part of the defendant devolved upon the plaintiff, *and is not, in the face of the stipulation, to be presumed from the mere fact of a mistake, but must be proven by independent facts, or by circumstances connected* with the principal fact, and warranting the conclusion or inference of wilful misconduct or gross negligence."

In that case proof was offered of the incompetency of the operator.

In the Hart case the Court held that the plaintiff, in the face of the stipulation, could not recover for the error shown "except by proving wilful misconduct for gross negligence on the part of the defendant."

In *White* vs. *Western Union,* 14 Fed. 710, the error consisted of the change of the word "fifteen" to the word "fifty." The Court said (page 713):

> "the burden rests upon the plaintiffs to show that this error or mistake occurred through the *culpable negligence or gross carelessness* of the operators or employes of the defendant company. *It is not sufficient for them to say there is a mistake which has occurred in transmitting this dispatch to the office of the company in St. Louis, but they must show that it occurred through the gross carelessness or culpable negligence of the employes of the defendant company."*

In *Jones* vs. *Western Union Tel. Co.,* 18 Fed. 717, the error was the change of the word "Chicago" to the word "cheap." The Court said:

> *"The plaintiff has offered no evidence of negligence on the part of the defendant other than that the message as delivered differed from the message as written in the particular mentioned. . . .* It is sufficient to say that the weight of authority and the ablest and best reasoned cases establish the doctrine that the conditions contained on the blank, on which the plaintiff wrote his message and to which he assented, are reasonable and valid to the extent of protecting the telegraph company from damages for any error or mistake occurring in the transmission of the message, unless it is shown affirmatively that such error or mistake was the result of gross negligence or fraud on the part

> of the company; *and that mere proof of the fact that there is a mistake of a word or a figure in the message is not sufficient evidence of negligence or fraud to render the Company liable beyond the amount stipulated for in the contract of the parties.*"

The case of *Pegram* vs. *Western Union,* 2 Southeastern 256, resembles somewhat the case of *Redington* vs. *Pacific Postal Tel. Co.,* in California, in that the error consisted in dropping a part of a word. The plaintiff did not rely upon simple proof of error, as indicated by plaintiff here, *but introduced evidence of independent facts,* tending to show gross negligence. The Court said:

> "This case is clearly distinguishable from *Lassiter* vs. *Telegraph Co. In that case the mere fact of the mistake was the only evidence of negligence.* Number of words sent was the number of words received. There was no evidence as to how the mistake occurred; and no evidence of carelessness or incompetency on the part of the agents of the company, nor was there anything to indicate that the message was of special importance."

In *Western Union* vs. *Neill,* 44 Amer. Rep. 589, the error was in the change of the word "have" for the word "home." The plaintiff had judgment and the case was reversed.

The Court said:

> "We are further of opinion that the mere fact that there may have been an error in the message as received by the operator at Austin and delivered to appellee Neill, *is not of itself sufficient proof of negligence* to entitle the plaintiff to recover, as the error may reasonably be referred to some other cause, embraced within the exemption clause contained in the contract. *Aiken* vs. *Tel. Co.,* 5 S. C. 367; *Sweetland* vs. *Tel. Co.,* 27 Iowa 455; s. c. 1 Am. Rep. 285; *Tel. Co.* vs. *Gildersleeve,* 29 Md. 248."

In *Kiley* vs. *Western Union Tel. Co.,* 109 N. Y. 231, the message was delayed, in consequence of which the plaintiff suffered damage for which he recovered judgment. The case was reversed. The Court after holding the stipulation to be binding, said:

> "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went as far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there, remains unexplained. It was not shown that the failure was due to the *wilful misconduct of the defendant, or to its gross negligence.* If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and

the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation."

In *Grinell* vs. *Western Union Tel. Co.,* 113 Mass. 299, 18 Am. Rep. 485, the error consisted in the omission of a word from the message. The Court in an Opinion written by Chief Justice Gray, says:

> "There was no offer at the trial to show any wanton disregard of duty or gross negligence on the part of the Company or its agents. The offer to prove that 'there was negligence on the part of the operator,' in not sending the whole message received, must be understood to mean want of ordinary care."

In the Primrose case, supra, where the principal error consisted in the change of word "bay" to "buy," the Court said:

> "The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message."

It seems to us if the Court will examine the message in suit as it is found in paragraphs VI and VII, it will be seen that the insertion of the word "not" is an error which might easily be made, and under no theory can it be assumed that an operator would change the message either wilfully or intentionally. The word "not" occurs in two other places in the message and it is not an uncommon mistake in typing or copying, for a word in the text like this, to be repeated, or for the subject matter between two identical words to be omitted.

Under the clear rule of law the Court cannot find there was any gross negligence or wilful or intentional wrong, and without independent proof of facts which show wilful misconduct and gross negligence, plaintiffs cannot recover.

We respectfully submit that

(1) Plaintiffs sustained no loss.

(2) Plaintiffs had reasonable cause to know of the error in the message before accepting the offer.

(3) Plaintiffs were bound by the terms and conditions of the message contract and established regulations as to limited liability.

Dated: San Francisco, October 14th, 1921.

Respectfully submitted.

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of Counsel.

No. 3690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE U. HIND and JAMES ROLPH, JR.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY
(a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

ANDROS & HENGSTLER,
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I. FALLACY IN DEFENDANT'S ARGUMENT AS TO DAMAGES. THERE IS A PRIMA FACIE CASE OF LOSS AND DAMAGE.

1. It is important to note that the message was sent on *February* 25, 1916, and that the premium on the war risk, amounting to $6970.54, was paid eight months later, viz., on October 24, 1916.

During the intervening eight months the European war was raging, with the attendant submarine and other sea perils, and the price of war risk insurance varied and fluctuated with the uncertain

events of the war at sea. No one could foretell today what the premium on a war risk would be tomorrow.

Defendant's argument rests largely upon the fallacious assumption that this premium, to be paid in the future, was, on February 25, 1916, a fixed quantity known to be the sum of $6970, whereas, in truth, the uncertainty on which business men had to take their chances was that it might eventually be one-fourth, or twice, or any other fraction or multiple of that amount.

Defendant's fallacious assumption appears at the very beginning of the Brief, on page 2. Speaking of an offer of February 24th by Green & Co., respondent states:

> "This offer, if accepted, would have yielded plaintiffs $229,180 gross or $222,210 net, after paying the war risk of $6970."

Plaintiffs could not possibly know, in February, what the war risk would be in October or whether the offer of February 24th would yield them a net receipt of $222,210, or of $228,000, or any other sum less than $229,180. As long as war risk was chargeable to them, their figuring on a business transaction remained highly speculative. If they, as merchants, desired to eliminate this uncertainty, they would naturally insist upon a price-offer which would transfer the uncertain element to the shoulders of the buyer. It was also natural to assume that the buyer in England would have the better facilities for watching the changing fortunes of naval warfare

and would, therefore, be better fitted to speculate on this particular element of the price.

2. To show that plaintiffs suffered no injury, defendant contends (without citing any authorities for the contention) that

> "The measure of damage is the difference between the price at which they sold and the price which they could have obtained for the barley, had they not been misled by the message. But it is admitted that they received *the highest market price.*" (Brief, p. 5.)

Defendant is mistaken; for it is NOT ADMITTED that plaintiffs received the highest market price; the contrary is STIPULATED, viz., "that there was NO PARTICULAR MARKET PRICE for Superior Barley on or about the 25th February, 1916" (Transcript, p. 27). It was an extraordinary time, a time when a seller of grain could put his own price on his goods. It is, therefore, impossible to predicate the measure of damages on the market price.

The rule to be applied to property having no market value is fixed, in California, by section 3333 of the Civil Code as *the amount which would compensate the owner for all detriment proximately caused thereby, whether it could have been anticipated or not.* This is substantially the general rule laid down in the *Esteve Bros.* case, 268 Fed. 22, discussed in our Opening Brief, on page 6, and confirmed by the cases cited on pages 15-17 of said Brief.

The citation from *Jones on Telegraph and Telephone Companies* (our Brief 15) shows that the measure of damages is "the difference between the price the property actually sold for *and that which he thought he was getting for it*". It would perhaps be more accurate to substitute for the words last cited: "and that which *defendant wrongfully induced him to think* he was getting for it"; at any rate the principle, in this modified and limited form, is sufficient for plaintiffs' contention.

It may be understood, therefore, that our contention is not, as defendant claims, that plaintiffs were entitled to recover on the broad basis of what "he thought he was going to receive" (defendant's Brief, p. 7), but we contend that plaintiffs are entitled to recover on the basis of what they *had a legal right to think* they were going to receive, as a result of defendant's representations. Defendant told them falsely: You are going to receive this specific sum; but in truth they received a lesser sum; the difference between these two sums is plaintiffs' actual, certain, definite positive loss.

Defendant argues that the case of *Reed v. Western Union*, cited in our Brief, is in fact authority for defendant, relying for this argument upon a reference to "the actual market value of the lot". But how could this be, in view of the stipulation that there was no particular market price?

Micklewait v. Western Union Tel. Co., 84 N. W. 1038, is cited as "a case in all respects like the pres-

ent one" (Brief, p. 9). It is clearly distinguishable. In that case plaintiffs were *directed* by the sender of the message to *buy* corn for him at 20½ cents. Plaintiffs did so and made a profit. The telegraph company, in transmitting the message, had erroneously changed the figures 20½ into 21½, but the error had no effect, as plaintiffs had still succeeded in making a profit on the transaction. To make a profit was their object, and they would undoubtedly have bought the corn on the prospect of making any profit, even a profit of $73 instead of $255. They would have done exactly what they did do, error or no error in the telegram. That is why the court said:

> "The mistake in the message caused them no loss of profits; for if it had been correctly transmitted, they would have been in the same situation they now are."

In the instant case, per contra, plaintiffs, if the message had been correctly transmitted, would not have been in the same position in which they now are, but would have saved their $6970. Their object was not to make whatever profit they could in buying goods for an English merchant, but to save a specific, identical expense. It is a fact in the case that *plaintiffs would not have shipped but for defendant's misrepresentation.* Defendant is mistaken (as we have shown, and will show further) in the statement that, what plaintiffs expected to receive

> "was $2450 more than they offered to sell for, and more than the offer which the buyers had declined." (Brief, p. 10.)

What plaintiffs had a right to expect to receive was $6970 more than what they did receive; the loss was the proximate result of the false message.

Western Union Tel. Co. v. Hall, 124 U. S. 444 (Brief, p. 10), is a very different case from the instant case. There plaintiff sued for damages on the ground that he MIGHT have made a profit IF he had sold on November 10th, "the sale on that day being purely contingent, without anything to show that it was even probable or intended, much less that it would certainly have taken place". This is quite different from the instant case, where plaintiffs *did* make a definite payment of $6970, because they *did* sell as the result of defendant's misrepresentation.

Western Union Tel. Co. v. Waxelbaum, 113 Ga. 1017 (Brief, p. 11). This case also is easily distinguishable: The plaintiff, on account of a false telegram, had to pay 1¢ more for eggs than he expected. The eggs were bought for sale; his profits or damages depended upon what he realized from such sale. But there was no proof as to how many were sold, or at what prices; in other words, there was a total absence of proof of damage. In the instant case the damage is the proximate loss of plaintiffs in the amount of the war risk premium.

Acheson v. Western Union Tel. Co., 96 Cal. 641 (Brief, pp. 11-12) is likewise easily distinguishable: The Supreme Court reversed a judgment by default on two distinct grounds: First, that the complaint

stated no cause of action; second, that the complaint *failed to show any special damage.* The court said:

> "The gist of the action is for the recovery of special damages, and there is no allegation of special damage * * * If plaintiff suffered special damage by the *failure to purchase certain hops,* there should have been averments under which evidence of such special damage, and the facts upon which it rested, could have been introduced."

There is an obvious distinction between a case where a party *might* have made a profit *if* he had bought goods and *if* he had thereafter sold them, and the instant case, where an actual *sale* was made, being induced by defendant's deception and followed by an immediate and definite loss; there is also a distinction between a case where no special damage is averred or proved, and the instant case where the specific and definite loss of $6970 is shown as the proximate result of defendant's misrepresentation.

Plaintiffs have established a prima facie case of loss and damage. Defendant's argument that eventually this *might* not have been a loss, but a gain, is no defense. If defendant could show that the sale of the barley *would* not, eventually, be a detriment, this would be a defense; but the burden of showing that later profits made up for the prima facie loss is upon defendant, and defendant has made no such showing.

II. REPLY TO ARGUMENT THAT PLAINTIFFS ARE BARRED BY CONTRIBUTORY NEGLIGENCE.

Defendant argues that plaintiffs had no right to act upon the message because they had reasonable grounds to suspect that the message was untrue. The alleged grounds were that the message contained an offer for $2456 more than the plaintiffs had asked, and plaintiffs should therefore have known that there was something wrong.

The conclusive answer to this argument is that the message did NOT contain an offer for $2456 more, or any other sum greater, than the plaintiffs had asked.

Defendant bases its argument upon "mathematics" which, it says, "cannot be denied" (Brief, p. 14).

However, it is easy to demonstrate mathematically the fallacy of respondent's mathematics. It lies in line 8 of page 14 of respondent's Brief, reading:

"Less war risk (to be paid by sellers) $6970."

This assumes that $6970 was the premium on February 25th, and was an immutable sum between that date and the date in October when it was paid by plaintiffs. The assumption is unwarranted. This sum was, during the exciting events of the war, subject to daily variation; in the event that the submarine perils were successfully overcome, it would diminish indefinitely. The evidence does not show, what the premium was on February 25th. Assuming that, by the time the La Rochejaquelin should sail, the sum would be $3485 (one-half the sum used

by respondent for its erroneous calculation), the arithmetic on page 14 would be:

"Sellers offer net $225,695.
15,105 quarters at $14.87½ equals 224,686."

On this assumption, therefore, the message, as delivered, offered to plaintiffs one thousand dollars *less* for their barley than they had asked, and this deficiency would be increased in proportion as the rate of premium would decrease.

The natural course to be followed by a conservative merchant, on February 25th, was to eliminate the uncertainty of this highly speculative element by transferring the risk to the buyer. This is what plaintiffs did by fixing a definite price for their goods, which would not be affected or qualified by subsequent fluctuations.

III. REPLY TO RESPONDENT'S ARGUMENT AS TO LIMITED LIABILITY.

The agreement signed by F. G. Green & Co., on the face of the message blank, requests the telegram to be forwarded to plaintiffs, subject to the "CONDITIONS" printed on the back.

There are on the back two sets of "conditions", headed:

> (*First Set*): "Conditions on which this telegram is accepted if it be handed in at an office of the Western Union Telegraph-Cable System." (Transcript p. 35.)

> (*Second Set*): "Conditions on which this telegram is accepted by the postmaster-general if it be handed in at a public telegraph office in the United Kingdom." (Transcript p. 36.)

The second set of "conditions" has no application to this telegram.

The first set of "conditions" applies, but there are, among these conditions, none that refer to repeated messages, or unrepeated messages, or any distinction between repeated and unrepeated messages. The only "condition" that could, with any plausibility, be claimed to be applicable to the facts of the instant case, is the following:

> "The company shall not be liable to make compensation, beyond the amount to be refunded as above (viz.: the charges paid by the sender for the telegram), for any loss, injury or damage arising or resulting from * * * error in the transmission or delivery thereof, *howsoever such error shall have occurred.*" (Transcript p. 36.)

Defendant recites (Brief, p. 19), that among the "*conditions*" referred to, on the face of the message, is the following: "All important telegrams should be repeated, for which an additional quarter rate is charged". By an accident which favors defendant, this clause is printed, in defendant's Brief (page 19, paragraph before the last), in conjunction with the "conditions" referred to in the last paragraph of said page. But the last paragraph on page 19 should obviously be the first paragraph on page 20 and refers only to what follows, and

not to what precedes. An inspection of the back of the cablegram (in the custody of this court) shows conclusively that no such "condition" exists. The clause referred to, although printed on the back, is no more a "condition" of the contract than is the clause that "the public are recommended to hand in their telegrams at the Company's Stations", or the clause that "the forms upon which telegrams are written should be marked Via Western Union, Via Anglo, or Via Direct". All these clauses are recommendations, but are expressly distinguished from "conditions" by the fact that the clauses which are intended to be conditions are expressly headed as such. (Transcript, pages 34, 35, 36.)

Defendant argues (Brief, p. 20), that

> "By the terms of the contract defendant was not to be held liable for error beyond the amount paid for the transmission."

Indeed, if the clause referred to were binding, this would apply to any error, "howsoever such error shall have occurred", and to "*any* loss or damage resulting from error", whether the message was repeated or unrepeated, or whether the negligence causing the error was slight or gross, or whether the error was caused by wilful misconduct.

Such a stipulation is *void, as against public policy,* in so far as it would relieve the company from liability for want of the high degree of care and diligence required by law. The burden is on the company to show that there was no want of due care and diligence. The evidence is not only in-

sufficient to show that the company exercised due care and diligence, but the facts disclose strong evidence of gross negligence, if not wilful misconduct.

Western Union Tel. Co. v. Cook, 61 Fed. 624 (decided by this court).

The cases cited on page 21 of defendant's Brief have no bearing on the instant case; for, as defendant says, "in all those cases the *validity of the stipulations relating to unrepeated messages*" was involved and affirmed. In the instant case, however, there is NO STIPULATION relating to unrepeated messages; there is no classification into or distinction between repeated and unrepeated messages; they are treated all alike by the company, and the contract which defendant made with the plaintiffs notifies them in advance that the same limitation of liability shall apply in the event of any error in the transmission, "howsoever such error shall have occurred".

Esteve Brothers Case.

Defendant relies upon this case, decided by the Supreme Court since the decision of the instant case by the District Court.

1. In the *Esteve* case there was no written contract between the parties; in the instant case the rights of the parties are defined by a written contract. The only conditions binding upon plaintiffs are the "conditions" expressly subscribed to by the sender of the message, and among these there

is none based upon the distinction between repeated and unrepeated messages; on the contrary, all distinction is impliedly abolished.

2. In the *Esteve* case the *repeated* rate *offered to the sender greater liability in case of error;* in case of error in a repeated message the liability was agreed to be far greater than in case of error in an unrepeated message. The existence of this fact is the raison d'être of that case. In the instant case, on the other hand, this fact is absent. The sender was given express notice that the company would not be liable beyond the charges paid by the sender for *any* damage arising from error in the transmission, *however* it shall have occurred.

In effect this "condition" is more than a limitation of liability, applicable to a particular condition; it is a categorical declaration that there shall be no liability for error in the transmission under any circumstances (*Jacobs v. Western Union Tel. Co.,* 196 S. W. 31).

Would not an intelligent sender reading such a condition come to the conclusion that there would be no use to repeat the message, as, *so far as the liability of the company is concerned,* he would not be protected against damages by repetition?

The fact that defendant had, in its general business, established a classification between repeated and unrepeated messages, does not aid defendant in this case; for it had neither brought this classification home to plaintiffs, expressly, nor permitted

it to be brought home to them, impliedly, as a matter of law.

In *Union Construction Company v. Western Union Tel. Co.,* 163 Cal. 299, there is an illustration of the clauses used on defendant's blanks, where it intends to rely upon repetition of the message for the purpose of limiting its liability, they read:

> "It is *agreed* * * * that said company shall not be liable for mistakes * * * in transmission * * * of any *unrepeated* message, beyond the amount received for sending the same; nor for any mistakes * * * in the delivery of any *repeated* message, beyond fifty times the sum received for sending the same, unless specially insured. * * * Correctness in the transmission of a message * * * can be insured by contract in writing * * *."

There is no such clause, or clause having a similar effect, in the instant case.

In the *Esteve* case the distinction between liability for error in repeated messages and liability for error in unrepeated messages was brought home to the plaintiff as a matter of law.

But in the instant case the distinction is twice abolished by the contract:

First: by the sender of the message agreeing that his contract shall be subject to the conditions printed on the back (and no other conditions);

Second: by the company insisting upon the same limitation of its liability, whether it arises from error in a repeated, or an unrepeated message,

and thus placing substantially the risk of error, involved in transmitting the message, upon the plaintiffs.

Defendant's attempt to take the instant case out of the rule of *Union Pacific R. R. Co. v. Burke,* Advance Opinions p. 318, must fail; for, in the case before this court, no offer was made to the sender of a rate under which the company would assume *any substantial,* much less *full* liability for all losses suffered through the fault of the company. It may have offered alternative rates for repeated and for unrepeated cable messages; but it stipulated, at the same time, that *its liability for error* should be the same in either case. The repeated rate did not, as it did in the *Esteve* case, offer "greater liability in case of error".

In all the cases cited by defendant the company said to the sender: I will indemnify you for any, or at least the substantial, damage resulting from my negligence if you repeat the message and pay me an additional compensation.

In the instant case, however, the liability of the defendant company is not affected by any clauses with relation to unrepeated and specially valued messages. In fact there is no condition making the distinction. The recommendation that "all important telegrams should be repeated, for which an additional quarter rate is charged" is *not* a condition; even if it were a condition, the distinction between a repeated, and an unrepeated, message is

contractually wiped out by the clause that, in either case, the liability of the company shall be the same, viz.: a liability of no substance whatever.

All of the authorities cited by defendant, and its argument, being founded upon the presence of unrepeated-message stipulations of liability, and there being clearly no such stipulation in the instant contract, the authorities and the argument have no application to the instant case.

If the language of the contract admitted of any doubt, it would be resolved in plaintiff's favor:

> "These contracts are prepared by the telegraph company and printed upon all of its blanks provided for the use of the public. They are not often the result of negotiation between the parties. The sender has no choice, nor any reasonable opportunity, to make terms not specified in the printed contract. * * * Hence, *if it is uncertain in any particular, its language on that point is to be interpreted most strongly against the company.*"
>
> Shaw, J., in *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 299.

The instant "condition" comes within the language used in the case of *Jacobs v. Western Union Tel. Co.*, 196 S. W. 31:

> "A stipulation by such a company that its liability is limited merely to the amount received for sending the message is *not a limitation of liability,* but is a *declaration that there is no liability,* since the sum paid would be due to the sender, by reason of the unperformed service, without such stipulation. The so-called agreement is nothing more than a claim of one-sided

right to wrongfully fail to perform the contract without being responsible for any damage occasioned by the wrong. It may be such a stipulation would be good where the failure of the company is unavoidable; but to assert an unqualified release from all liability save to refund the charge collected for the unperformed service is, in effect, to claim non-liability for negligence."

IV. DEFENDANT IS CHARGEABLE WITH GROSS NEGLIGENCE, IF NOT WILFUL MISCONDUCT.

1. The cause of the damage to plaintiffs was more than an "*error* in transmission" of the message.

If the principle of strict construction be applied, it would be proper to hold that an "error" falls short of *any* negligence; for negligence connotes blameworthiness, whereas "error" does not. From this it would follow that the "condition" purporting to exempt defendant from liability for "error" does not reach a case in which the condition of the message as delivered shows *admitted negligence.*

> "Fault imports blame; error may arise from ignorance or mistake alone."
>
> *The Manitoba,* 104 Fed. at 154.

We contend that this negligence amounted to at least *gross negligence,* if not to wilful misconduct.

2. Defendant says that this contention "is answered by the decision of the Supreme Court in the *Esteve Bros.* case" (Brief, p. 30); but this is

clearly a mistaken view of that case, which is predicated upon "absence of wilful misconduct or gross negligence" (Adv. Op. 1920-21, p. 654). We shall hereafter show the distinction between the "errors" in the two cases and show that the error in the instant case *was* greater than in the *Esteve* case.

Defendant is also clearly wrong in the statement that "gross negligence arises where there is evidence of wilful misconduct or intentional wrong". The courts (including the Supreme Court) would not uniformly speak of "wilful misconduct OR gross negligence", if there were no distinction between these two faults. "Gross negligence" connotes a negative mental attitude, whereas "wilful misconduct" or "intentional wrong" connotes a positive attitude. Defendant is liable under the cases, even though the tort shown is less than an intentional wrong.

3. If the sender of a telegram hands to the company, as was done in this case, a message containing 30 words, it may well be that the changing of one of these 30 words, or dropping a word out of the message, is negligence of the ordinary kind; but where the company reaches out of the message and inserts a new and additional word into it, it is not only grossly negligent, but exercises its will positively, so as to come within the scope of the word "wilful". This applies with particular force to the instant case where defendant picked the most fateful of all words, the word *"not"*, and added

it to the message, thereby changing its meaning into the exact opposite. In the nature of things the handling of this particular word—so fraught with danger if misused—calls for the greatest care on the part of the Telegraph Company; any negligence connected with the application of the word "not", on the part of a carrier of messages, should be considered gross negligence per se. The act of *adding* the word to the message and thereby reversing its meaning is not only gross negligence per se, but raises a presumption of wilful misconduct. It is certainly a typical example of "the exercise of so slight a degree of care as to justify the belief that there was indifference as to the interest and welfare of others" (*Redington v. Pacific Postal Co.,* 107 Cal. 567). We contend that the facts are more than sufficient to constitute a prima facie case of gross negligence on the part of defendant.

4. It may be admitted that ordinarily wilful misconduct or gross negligence are not to be presumed from the mere fact of a mistake; but in the instant case the conclusion or inference of wilful misconduct or gross negligence is warranted. In most cases, and in particular in the cases cited by defendant, the question is as to the *quantity* offered in the false telegram received (whether more or less than the quantity actually offered); but in the instant case the question is as to the existence or non-existence of an element of the proposed contract, nay more, the *false assertion of the direct opposite*

of the truth. The burden of proving an excuse for this flagrant wrong and of reducing it from its prima facie character of gross negligence, is upon defendant. Indeed, plaintiffs *could not possibly* show, how, or why, "in transmitting said message over said land-line, defendant inserted the word 'not' between the words 'Ipswich' and 'including'." On the other hand, defendant has the easy and obvious means of showing the facts. If defendant was grossly negligent in employing incompetent, inexperienced or reckless operators, plaintiffs could not show it, even if they subpoenaed every operator between New York and San Francisco; on the other hand, if defendant employed competent and experienced operators, and had a good excuse for its apparent gross negligence, it would have been easy to show it and would certainly have been shown by the proof.

5. The authorities.

a. *Defendant's authorities:*

The Supreme Court said, in the *Primrose* case, 154 U. S. 1 (Brief, p. 35):

> "By no devise can a body corporate avoid liability for fraud, for wilful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue."

In that case the mistake consisted in changing the word "bay" to "buy" (or the letter "a" to the letter "u"). It would be difficult to find an illustra-

tion of slighter negligence. On the other hand it would be difficult to find an illustration of so extreme a case of prima facie gross negligence as the instant one.

In the *Esteve Bros.* case the message, as delivered, directed a sale of 2,000 bales of cotton. The message actually sent had directed the sale of 200 bales. The error in the figures is assumed to be a case of ordinary negligence.—This is very different from the instant case, which involves not merely a question of quantity, but a positive statement ~~from~~ that the sender made the opposite offer of the true one.

White v. Western Union, 14 Fed. 710 (Brief p. 32) is another good illustration of slight, or at most ordinary, negligence—the change of the letters "teen" to the letters "ty".

Jones v. Western Union, 18 Fed. 717 (Brief pp. 32-33). The word "Chicago" was changed to the word "cheap". The sender elected to send his message at half-rate, under a contract limiting the liability of the company in such cases. *No question of the degree of negligence is involved.* The passage quoted means that mere proof of a mistake in the message involved is not sufficient evidence of gross negligence, which we admit. This, however, does not apply to the instant case, showing *on the face* not merely a mistake, but negligence of an extreme character, and probably wilful misconduct.

Pegram v. Western Union (Brief, p. 33). The distinction is obvious: The dropping of a part of

a word is very slight as compared with the inserting of so pregnant a word as the word "not". Other distinctions are apparent on the face of the citation of what "the court said".

Western Union v. Neill, 44 Am. Rep. 589 (Brief pp. 33-34). This is another prima facie case of slight negligence, therefore not in point. The negligence shown in the instant case is prima facie gross, if not more.

Kiley v. Western Union (Brief pp. 34-35). Distinction: A failure of a message to reach destination may be caused by gross negligence, or by ordinary negligence of the company; if the latter, it is within the stipulations for limited liability. The *insertion* of the word "not" in the message is prima facie an *active,* positive fault, due to either wilful misconduct or at least gross negligence.

Grinnell v. Western Union (Brief p. 35). Distinction: The "omission of a word from a message" is prima facie ordinary negligence. The insertion of a word in the message (*a fortiori* the word "not") is prima facie gross negligence.

The facts in the instant case show at least such entire want of care, and, in our opinion, such wilful misconduct, as would raise the presumption of a conscious indifference to consequences. With the exercise of ordinary care such a default would be improbable, if not impossible.

b. *Plaintiffs' authorities:*

In *Pegram v. Western Union,* 2 S. E. 256 (cited also by defendant, on page 33 of its Brief) the

court *held,* that *a change in the number of words* of a telegram by *omission* of one word is *gross negligence,* so as to make the company liable.

It is submitted that the *addition* of one word to a telegram is, *at least,* gross negligence; if that word is the word "not", the addition is a wilful, positive act amounting to the "wilful misconduct" referred to in the recent cases in the Supreme Court. The true message in the instant case consists of 30 words; defendant added another word, and if it had searched the dictionary, it could not have found one of a more fatal effect to the interests of plaintiffs than the one word which it added. The words used by His Honor Judge Ross, in *Western Union Tel. Co. v. Cook,* 61 Fed. 624, apply:

> "The evidence strongly tends to show not only that the company *did not use great care* in the transmission of the message, but was *grossly negligent.*"

See also *Western Union Tel. Co. v. Lange,* 248 Fed. 656 (opinion by Hunt, J.).

In *Western Union Tel. Co. v. Goodbar,* 7 So. 214, the delivery of a message consisting originally of nine words, with only seven words in it, was held to be *gross negligence,* for which the company was liable despite the stipulation.

In *Wolfskehl v. Western Union Tel. Co.,* 46 Hun. 542, the *omission* of the word "not" was held negligent rendering the defendant liable.

In *Redington v. Pacific Postal Tel. Co.,* 107 Cal. 317, the Supreme Court of California upheld a

finding that the dropping of the syllable "teen" so as to alter the word "nineteen" to "nine" was gross negligence.

The argument of defendant is based upon the fallacy that evidence of gross negligence requires evidence of wilful misconduct or intentional wrong. Defendant says that "under no theory can it be assumed that an operator would change the message either wilfully or intentionally" (Brief, p. 36). It is not necessary, for the success of plaintiffs' cause, to make such an assumption (although it could have been positively and easily set at rest, had defendant presented evidence to show, how and why its default was made possible). It is sufficient to show that the company was guilty of gross negligence. On this question the principle of *res ipsa loquitur* applies.

We reserve the contention, however, that even if the court should not hold the default of the defendant to amount to gross negligence, the defendant would still be liable to plaintiffs for the damage suffered, by reason of the fact that the contract in suit makes defendant liable for ordinary negligence, as shown under the previous heads of this argument.

Dated, San Francisco,
November 19, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
Attorneys for Plaintiffs in Error.

No. 3690

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE U. HIND and JAMES ROLPH, JR.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY
(a Corporation),
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

BEVERLY L. HODGHEAD,
Attorney for Defendant in Error.

FRANCIS R. STARK, of New York,
Of Counsel.

The James H. Barry Co., 1122 Mission St., San Francisco.

IN THE

United States Circuit Court of Appeals

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GEORGE U. HIND and JAMES ROLPH, Jr., *Plaintiffs in Error,*

vs.

WESTERN UNION TELEGRAPH COMPANY (a Corporation), *Defendant in Error.*

No. 3690

REPLY BRIEF OF DEFENDANT IN ERROR

I. AS TO DAMAGES

As we have dealt with this question fully in our former brief, this reply will be confined to a few references on this point to the brief of plaintiffs in error, filed since the oral argument.

Our objection to plaintiff's argument is that the principal point made in the Reply Brief is outside the record and that, while many of our statements are disputed, they are not in any way disproven. There is no evidence or admission in the record that there was any fluctuation in insurance rates, nor is it even shown when the shipment of barley was made.

All that appears from the Agreed Statement is that the war risk was paid October 24 (Par. XIII). There was certainly no evidence that there was better information concerning insurance rates in England than in San Francisco. When plaintiffs offered by the message of February 24 to pay the war risk, they must have had in mind the war risk prevailing at the time they intended to make the shipment. This is the same war risk which would have been paid, if it had been borne by the buyers. The amount of the war risk was the same, no matter who paid it. The fact is that if plaintiffs' offer to sell for 63s 9d per quarter had been accepted, the cargo would have yielded $229,180 gross. It is also true that they would have had to pay $6970 war risk, and that the net return would have been $222,210. Therefore, we repeat that

> "This offer, if accepted, would have yielded plaintiffs $229,180 gross or $222,210 net, after paying the war risk of $6970."

This satement is disputed, but nothing is offered to disprove it, except certain assumptions above referred to which are not to be found in the record. Similarly, our statement that the message, as delivered to the plaintiffs, purported to offer them $2456 more than plaintiffs asked for the barley, because the answer to this statement is based upon the same assumption. I think it may be safely asserted that practically all of plaintiffs' argument upon this point,

found at pages 8 and 9 of the Reply Brief, is based upon matters which are outside the record.

Our contention is that the measure of damage is the difference between the price which plaintiffs received and the price which they could have obtained for the barley had they not been misled by the message, provided the record shows they could have obtained any greater sum. The plaintiffs say that in this contention we are mistaken, but no other rule of damage is claimed except it is said, page 3 of the Reply Brief, as follows:

> "It was an extraordinary time, a time when a seller of grain could put his own price on his goods. It is, therefore, impossible to predicate the measure of damages or the market price."

A seller cannot *put his own price on his goods* for the purpose of fixing arbitrarily the amount of damage which another shall pay him, irrespective of market conditions. It may be there was no *particular* market price at that time. There was a market price, for there was a sale, and the Agreed Statement further shows that the price received by the plaintiffs *"was the best price which said F. Green & Co. could secure at that date."*

Counsel seeks to distinguish the authorities cited in our former brief on this point by the declaration, page 7, that the acceptance of the offer was followed by a specific and definite loss of $6970, which statement, as appears from what is said above, is not

borne out by the record. If the Court will examine the authorities cited in the Opening and Reply Briefs of the plaintiffs in error, and which are commented upon, pages 7 to 9 of the brief of defendant in error, it will appear that there is no authority to sustain the contention that the plaintiff in such case can consider the amount *which he expected* to receive as a basis for the measure of damage, in disregard of market conditions. The record does not show any loss sustained by the plaintiffs. It can be demonstrated as readily from the facts which appear that plaintiffs derived a *profit* from the transaction as that they sustained a loss, and in fact it is stipulated in the record that plaintiffs did derive a profit from the sale of $30,000 net. It nowhere appears that they would have received more, if they had not made the sale.

II. REGULATIONS CONCERNING LIMITED LIABILITY

The regulations concerning limited liability are printed in our Brief (pages 19 and 20), in the form in which they appear in the record (Trs., pages 35, 36). As to the notice that "All important telegrams should be repeated, for which an additional quarter rate is charged," it makes little difference whether this is technically a condition or a recommendation or declaration. The important thing is that it is a fact which was brought to the attention of the sender, as evidenced by his own signature. It is admitted in the Agreed Statement that the mes-

sage in suit was sent as an *unrepeated* message, and paid for as such.

Plaintiffs in error construe the condition providing against liability beyond the amount of the toll as a contract which it is claimed is void as against public policy. The argument overlooks entirely the purpose and meaning of the Interstate Commerce Act, which is defined by the Supreme Court as intended to secure uniformity and an equality, among all those who employ the telegraph as a means of interstate communication. The case of *Western Union* vs. *Esteve Bros.,* cited in our former brief, related to an unrepeated cable message, and was sent under the public regulation and condition limiting liability in case of loss to the amount of the tolls. The Supreme Court held that the condition *was not against public policy,* as counsel contend, but is valid. The Court said that when the Western Union initiated and established this reasonable rate, the principle of equality and uniformity require that it should have the same force and effect as rates initiated by rail carriers. "That uniformity demanded that the rate represent the whole duty and the *whole liability* of the Company."

But counsel contends that in the present case the extent of defendant's liability is *modified by agreement,* or, in other words, that the condition printed upon the message-blank, being an invalid contract, as asserted by counsel, the plaintiff in this case is not bound by any limitation of liability. But the

Supreme Court said in the *Esteve Bros.* case as follows:

> "If the general public upon paying the rate for an unrepeated message *accepted substantially the risk of error involved in* transmitting the message, the company could not, without granting an undue preference or advantage, *extend different* treatment to the plaintiff here."

The Court further said:

> "The limitation of liability was but the inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered."

It was said in *Postal Tel. Co.* vs. *Warren Godwin Lumber Co.,* 251 U. S. 27, referring to the regulation concerning liability upon unrepeated messages, as follows:

> "It was held that such a contract *was not one exempting the company from liability for its negligence,* but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and *responsibility* exacted for its performance. Such a contract was, therefore, decided to be valid, and the right to recover for error in transmitting a message, which was sent subject to it, was accordingly limited."

Counsel undertakes to construe the condition with some degree of technicality, as though it were a contract exempting the company from liability for

its negligence, whereas the Court here declares that it is merely a reasonable condition adjusting the charge to the duty and *responsibility* or liability of the company or, in other words, that unrepeated messages are forwarded *substantially at the risk of the sender.* In fact, the Court in the *Warren-Godwin* case expressly states that it was the primary purpose of the amendment to the Act to Regulate Commerce to provide a rate for unrepeated telegrams, and to fix a reasonable limitation of responsibility where such rate was charged, and pointed out "that from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest." The same Court, as stated above, in the *Esteve Bros.* case held that the uniformity in rate and liability prescribed by the Interstate Commerce Act could not be varied by agreement, and in fact that the rate was not, as before, a matter of contract by which a legal liability could be modified, *"but became as a matter of law by which a uniform liability was imposed."*

These cases, it seems, without doubt meet every aspect of the argument of plaintiffs in error. Counsel attempts to distinguish the *Esteve Bros.* case by the statement that there was no written contract between the parties, whereas in the instant case the rights of the parties are defined by a written

agreement; but in the same case it is held that the rights of the parties cannot be varied or modified in any degree by contract.

The argument is repeated by counsed at page 14, that the present case is distinguished from all the others because, first, the sender agreed that his message should be sent subject to certain conditions "and no other conditions," and, second, that the company insisted upon *limitations of liability different from other cases.* But here again the Supreme Court says this cannot be done; that all cases are subject to the same rule of uniformity of rate *and of liability.*

Again, plaintiffs in error contend that although they adopted the unrepeated message rate in the payment of the telegram, they are not bound by any limitations of liability, because "no offer was made to the sender of a rate under which the company would assume any substantial, much less full liability, for all losses suffered through the fault of the company," and that it "contracted" for the same liability for repeated as for unrepeated messages. But this the Court held in the *Esteve Bros.* case the *defendant could not do.* Its liability for an unrepeated message is fixed by law, and this the Court said "could not be varied by agreement," still less could it be varied by lack of agreement. In the *Esteve Bros.* case the same condition was made that the rule of uniformity as to liability did not apply to the plaintiffs there because there was a lack of

any actual agreement as to liability. Here it is contended there was an agreement varying the liability, neither of which is possible under the law and under the decisions.

Counsel further claims that plaintiffs in error are not subject to the rule of uniformity because they were not offered any "greater liability in case of error," in respect to a repeated message. The plaintiffs, however, were entitled to pay the same rates and have the company assume the same liability in respect to unrepeated messages as all other persons. If the defendant, by any agreement, assumed to reduce its liability in the case of *repeated* messages below what it was authorized by law to do, the agreement would be void. The alternative rates were offered to the plaintiffs *as a matter of law,* and could not be varied by agreement or lack of agreement. As said in the *Esteve Bros.* case, "The repeated rate offering greater accuracy and greater liability in case of error was open to anyone who wished to pay the extra amount for extra security." The defendant had no authority to deny that rate. If the extent of liability can be varied from the general rule by special agreement, as contended here, or by lack of agreement as contended in the *Esteve* case, the rule of uniformity and equality prescribed by the Act of Congress and by the decisions of the Supreme Court would be destroyed. As stated in our former brief, we think the language of the Supreme Court, found in the last paragraph of the

Esteve Bros. case, meets directly the contention of plaintiffs in error that the rule has no application here because no distinction was made between the unrepeated and the repeated message. The condition printed upon the blank prescribes the usual liability in the case of an unrepeated message. Whether it would be valid in the case of a repeated message does not arise in this case. On this point the Court says:

> "Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored by having the message repeated, to secure the greatest care on the part of the company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the *unrepeated rate* that another *special rate* was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it."

It appears from the *Esteve Bros.* case that "for more than fifty years prior to the transaction here in suit, the Western Union had maintained these two classes of rates for general cable and telegraph service; that the usual or basic rate was for service *practically at the sender's risk,* liability being limited to the amount of the toll collected." That the "rate long before established, then formally adopted and

filed, shall *thereafter be the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent.*" That the Act of 1910 was designed to and did subject companies as to their interstate business to the rule of "equality and uniformity of rates." That "if the general public, upon paying the rate for an unrepeated message, accepted substantially the risk of error involved in transmitting a message, the company could not, without granting an undue preference or advantage, extend different treatment to the *plaintiff here.* The limitation of liability *was an inherent part of the rate.* The company could no more depart from it than it could depart from the amount charged for the service rendered."

The above, says the Court, are the rules established by the Act of 1910, and which the Court further says "introduced a new principle into the legal relations of telegraph companies with their patrons which dominated and modified principles previously governing them." Before the Act of 1910, the liability of the companies was dependent upon contracts which were variously interpreted by the different States. Under the Act of 1910 these conflicting standards of liability were brought under the rule of uniformity and equality, not only as to rate but as to *liability,* because the Court says that "uniformity demanded that the rate represent the *whole duty and whole liability of the company.*" The rate is no longer a matter of contract by which

a legal liability can be modified, but "as a matter of law by which a uniform liability was imposed."

We respectfully contend that the plaintiffs in error in this case can claim no exemption from this rule of uniformity. They are bound as a matter of law by the provision limiting liability for unrepeated messages because this measure of liability "is a part of the lawful established rate."

III. THE DEGREE OF NEGLIGENCE

Plaintiffs in error contend that gross negligence is shown from the fact of the error itself. The authorities cited in our former brief on this subject (pages 31-35), show that gross negligence is not to be presumed from the fact of the mistake alone, but must be proven by independent facts or circumstances which, taken in connection with the fact of the error, warrants the conclusion that there has been gross negligence. This is usually the incompetence of the operator, as in the case of *Redington* vs. *Postal Tel. Co.* and *Western Union* vs. *Cook,* cited by the plaintiffs. In the *Redington* case, gross negligence was found, not from the fact of the error, *but from the testimony of the witness called by plaintiff* to explain how the error could not have occurred except through the incompetence of the operator. In fact, the Court expressly says, as stated in our former brief, that the burden of proving gross negligence devolves upon plaintiff "and is not, in the face of the stipulation, to be pre-

sumed from the mere fact of the mistake, but must be proven by independent facts."

In *Western Union* vs. *Cook,* 61 Fed., a decision by Mr. Justice Ross, the statement that the evidence tended strongly to show gross negligence was not based upon the mere fact of the mistake, but upon the additional proof that the operator responsible for the error had had practically no experience in telegraphing for a period of over thirty years. Then follows the statement of the Court that "the evidence of the employment of such a man to transmit messages entrusted to a telegraph company not only fails to show the exercise of great care, but is strong evidence of gross negligence on its part." It is useless to argue that plaintiffs would not be in a position to prove gross negligence, because the two cases last cited contradict such contention.

In the *Pregram* case, cited in the brief of plaintiffs in error, the plaintiffs introduced evidence of independent facts tending to show gross negligence.

In *Western Union* vs. *Lange,* there was no error at all, but the loss arose from delay.

Counsel is, therefore, without authority for the statement that "the *addition of one word* of a telegram without proof of other facts constitutes gross negligence."

But the contention is made that the addition of the word "not" must be conclusively presumed to

be gross negligence, because its use is fraught with greater danger than other words. Measured by the results, its insertion in this case was much less disastrous than the insertion of an additional figure in the message in the *Esteve Bros.* case, which fact alone resulted in an admitted loss of $31,095. It is said that the addition of the word "not" changed the meaning of the message; but that is the effect of all errors in a message, for if there is no change in meaning, there would be no loss. An operator is not bound to know the meaning of all messages. Many of them are in code and many more are ambiguous, except as to the parties. The message in this case was ambiguous. It would tax the ingenuity of your Honors to sense its meaning without explanation. The word "not" occurs twice in the correct message. If it did not occur at all, there might be less justification for inserting a word entirely foreign to the message, but it is not an uncommon error in typing to repeat a word which frequently appears in the text. If your Honors should dictate a letter and when it is transcribed it should be found the word "not" is used where it was not intended, you would scarcely be justified in charging that it was done wilfully or that the negligence was gross, which, as said by the Court in the *Redington* case, "is an entire failure to exercise care, or the exercise of so little a degree of care as to justify the belief that there was an indifference to the interest and welfare of others." The fact that

the entire letter or message transcribed from symbols is accurate in every particular except in respect to one word, itself shows there was an intent to exercise care, and gross negligence will not be presumed unless there is independent proof of incompetence or indifference.

There is no greater negligence in dropping one word than another. There is no greater negligence in adding one word than another.

The error in this case was the same as in the *Esteve Bros.* case in that it consisted in the addition to the message of a character which was not there. It proved much less harmful than did the error in that case, yet the Supreme Court held there was no liability.

Respectfully submitted.

BEVERLY L. HODGHEAD,
Attorney for Defendant in Error.

FRANCIS R. STARK, of New York,
Of Counsel.

Dated: December 7, 1921.

No. 3691

United States
16
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

NORTHPORT SMELTING AND REFINING COMPANY, a Corporation,

Appellant,

vs.

LONE PINE-SURPRISE CONSOLIDATED MINES COMPANY, a Corporation,

Appellee.

VOLUME I.

(Pages 1 to 384, Inclusive.)

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3691

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

THE LONE PINE-SURPRISE CONSOLIDATED MINES COMPANY, a Corporation,

Defendant.

Names and Addresses of Solicitors of Record.

JOHN P. GRAY, Residence, Coeur d'Alene, Idaho, JOHN H. WOURMS, Residence, Wallace, Idaho, Attorneys for Plaintiff.

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Attorneys for Defendant. [2*]

In the United States District Court, Eastern District of Washington, Northern Division.

IN EQUITY —No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED MINES COMPANY, a Corporation,

Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Bill of Complaint.

Comes now the Northport Smelting & Refining Company, a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, as plaintiff, and brings this bill of complaint against the Lone Pine-Surprise Consolidated Mines Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and for cause of suit alleges:

I.

That the plaintiff, Northport Smelting & Refining Company, ever since the year 1901 has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, and now is, and during all of the time, and since the year 1901, has been a citizen and resident of Idaho, and has complied with the laws of the State of Washington authorizing foreign corporations to do business in said state, and now and ever since the year 1901 has been doing business within the State of Washington.

II.

That the defendant, Lone Pine-Surprise Consolidated Mines Company, is now, and for many years last past has been a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and now is and for many years last past has been a resident of the said State of Washington. [3]

III.

That the jurisdiction of the United States District

Court for the Eastern District of Washington, Northern Division, over this suit is invoked and depends upon the following grounds, to wit:

(1) Upon the ground that the construction and application of sections 2322, 2324, 2325 and 2332 of the Revised Statutes of the United States *if* involved, and the amount in controversy exceeds in value the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, all of which will appear from the facts herein set forth.

(2) Upon the ground that plaintiff is a citizen and resident of the State of Idaho, and the defendant is a citizen and resident of the State of Washington, as appears from the first and second paragraphs of this bill of complaint; that the suit involves a claim of title to real property in the Eastern District of Washington, Northern Division, and that the amount in controversy in this suit exceeds in value, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

IV.

That on or about the 28th day of February, 1896, certain predecessors in interest of the plaintiff, Northport Smelting & Refining Company, to wit: T. Ryan, Phillip Creasor and Charles Robins, all then citizens of the United States discovered a vein or lode containing gold and silver and other valuable minerals and metals, upon vacant and unoccupied public land within what was then Stevens County, but afterwards became a part of Ferry County, State of Washington, and within the limits of the claim hereinafter described as the Lone Pine Quartz Lode Mining Claim.

V.

That the said named persons on said date located a claim upon such vein or lode and named it the Lone Pine Quartz Lode Mining Claim; that they posted a notice upon said claim at the point of [4] discovery, which notice contained the name of the claims, the names of the locators and the date of location, the number of lineal feet claimed in length along the course of the vein each way from the point of discovery and the width claimed on each side of the center of the vein.

VI.

That the said locators immediately thereafter sunk a discovery shaft upon the lode and disclosed a vein of quartz and ore with one well-defined wall.

VII.

That said locators also immediately after posting said notice heretofore referred to distinctly marked the location on the ground so that its boundaries could be readily traced, and within thirty (30) days after making the discovery aforesaid, filed in the office of the County Recorder in the county in which the claim was located, a location notice in writing, a copy of which is hereto attached, marked Exhibit "A" and made a part of this bill of complaint.

VIII.

That thereafter the said discoverers and locators and their successors in interest held, worked, possessed and actually occupied the said Lone Pine Quartz Lode Mining Claim continuously from the date of said discovery for more than five (5) years, and during all of said time were in open, notorious, exclusive and uninterrupted possession thereof.

IX.

That said Lone Pine Quartz Lode Mining Claim is known as Lot No. 363 and is described as follows:

Beginning at Corner No. 1 of the Lone Pine Lode claim from which the southwest corner of Section thirty-six (36) in township thirty-seven (37) north, range thirty-two (32) E., W. M., bears south 58° 27′ 06″ east 6463.65 feet distant, and discovery cut bears north 51′ west 670.8 feet distant; thence first magnetic variation [5] 23° east, north 81° 23′ east 289.5 feet intersect line 3–4 of Survey No. 365 the Black Tail Lode Claim, 585.9 feet to Corner No. 2; thence second course magnetic variation 21° 45′ east, north 25° 55′ west 1455.7 feet to Corner No. 3; thence third course magnetic variation 22° east, south 81° 23′ west 626 feet to Corner No. 4; thence fourth course magnetic variation 22° 10′ east, south 27° 24′ 39″ east 1399.12 feet intersect line 3–4 of said Survey No. 365, 1468.12 feet to Corner No. 1 the place of beginning, expressly excepting and excluding however, all that portion of the ground embraced in said mining claim called the Black Tail Lode, Mineral Survey No. 365. Said Lone Pine Claim is situated in Eureka Mining District, Ferry County, State of Washington.

X.

That during the year 1897 the then owners of the Lone Pine Lode Mining Claim filed in the United States Land Office at Spokane, Washington, their application for a patent for the said Lode Pine Lode Mining Claim as above described and in their said application for patent recited the facts with refer-

ence to the discovery and location of the said claim as heretofore set forth, and filed in said land office a copy of the location notice heretofore referred to.

XI.

That the officers of the United States Land Office accepted said proof of discovery and location and said notice of location and on February 8, 1898, payment for said land was made by claimants to the United States and entry of said claim was allowed upon the proof aforesaid, and receiver's final receipt was issued, and subsequently, to wit, on the 2d day of March, 1899, the Commissioner of the General Land Office approved the acts of said officers of the United States land office and issued a United States patent to said owners of said Lone Pine Lode Mining Claim.

XII.

That subsequently, to wit, on the 19th day of July, A. D. [6] 1916, by mesne conveyances from the said original locators of the said Lone Pine Lode Mining Claim, the Northport Smelting & Refining Company, the plaintiff herein became the owner of said Lone Pine Lode Mining Claim; and that said Northport Smelting & Refining Company ever since has been and now is the owner of, in possession of and entitled to the possession of the said Lone Pine Lode Mining Claim, and all veins, lodes or ledges having their top or apices therein, throughout their entire depth between the end lines of said claim extended in their own direction.

XIII.

That the defendant, the Lone Pine-Surprise Con-

solidated Mines Company, is the owner of the Last Chance Lode Mining Claim, which adjoins the said Lone Pine Lode Mining Claim on its easterly side and that the relative situation of said Lone Pine and Last Chance Lode claims is correctly shown upon the map attached hereto marked Exhibit "C"; that the Last Chance Lode Mining Claim is described as follows, to wit:

Beginning for a description of the Last Chance Lode Claim at Corner No. 1 whence the southwest corner of Section thirty-six (36) in township thirty-seven (37) north, range thirty-two (32) E., W. M. bears south 58° 53′ 44″ east 5496.63 feet distant, and discovery cut bears north 33° 50′ west 200.2 feet distant; thence first course magnetic variation 23° 10′ east, north 4° 34′ 19″ east 200.1 feet intersect line 1–2 of Survey No. 374, the Micawber lode claim at south 77° 58′ east 0.2 of a foot from Corner No. 2 1379.23 feet to Corner No. 2; thence second course magnetic variation 23° east, north 62° 19′ west 150.31 intersect line 2–3 of said Survey No. 374 at north 54′ west 1442.71 feet from Corner No. 2 665 feet to Corner No. 3; thence third course magnetic variation 22° 45′ east, south 11° 13′ E. 907.64 feet intersect line 2–3 of the Lone Pine Lode claim 1630.2 feet to Corner No. 4; thence fourth course magnetic variation 24° 45′ east, south 62° 19′ east 182.30 feet to Corner [7] No. 1, the place of beginning, excluding from these presents all that portion of the ground hereinbefore described embraced in said Micawber lode claim survey No. 374.

XIV.

That some time subsequent to February 29, 1896, and prior to March 13, 1896, the predecessors in interest of the defendant, Lone Pine-Surprise Consolidated Mines Company located the Last Chance Lode Mining Claim and filed in the office of the County Recorder in the county in which said claim was situated a location notice in writing, a copy of which is attached hereto and marked Exhibit "B."

XV.

That thereafter and prior to February 8, 1898 the then owners of the said Last Chance Lode Claim filed in the United States Land Office at Spokane, Washington, an application for a patent for said Last Chance Lode Mining Claim based on the location notice aforesaid, and on the 8th day of February, 1898, said applicant paid for said claim and mineral entry was allowed and receiver's final receipt issued for said claim; and subsequently, and, to wit, on the 2d day of March, 1899, the United States issued its patent for said claim to the owners thereof.

XVI.

That within said Lone Pine Lode there is a vein or lode of rock in place bearing gold and silver and other valuable minerals and metals, which said vein or lode is commonly known as and called the Black Tail Lode, the top or apex of said Black Tail Lode crosses the southerly end-line of said Lone Lode Claim, which line connects Corners No. one and two of said claim and then proceeds in a northerly direction and crosses the easterly side-line of the Lone

Pine at a point about 618 feet north from the southeast corner of said Lone Pine Lode Mining Claim and continues until it crosses the west boundary of said Last Chance Lode Mining Claim. [8]

XVII.

That the downward course of said vein is easterly on its downward course between plains drawn downward vertically and parallel to the end-lines of said Lone Pine extended easterly in their own direction; said vein passes under and extends indefinitely easterly beyond the vertical plain drawn downward through the west boundary line of said Last Chance Lode Mining Claim; said vein on its downward course passes underneath the surfac*t* of the said Last Chance Lode Mining Claim.

XVIII.

Plaintiff avers that since the 19th day of July, A. D. 1916, said Northport Smelting & Refining Company has been the owner of and now is the sole owner in fee, in possession of and entitled to the possession of the said Lone Pine Lode Mining Claim and of said Black Tail vein throughout its entire depth between plains drawn downward vertically and parallel to the end-lines of said Lone Pine Lode Mining Claim, said end-lines extended easterly in their own direction.

XIX.

Plaintiff further avers that defendant claims an estate or interest adverse to plaintiff's in and to said Lone Pine Mining Claim and in and to the vein or lode heretofore referred to as the Black Tail Lode, and in and to that part of said Black Tail which lies

between the vertical plains drawn downward through the end-lines of said Lone Pine Lode mining claim and said end-lines extended easterly in their own direction, the exact nature of which claims are unknown to the plaintiff.

XX.

That plaintiff avers that said claims of the defendant and each of them are false and groundless and are a cloud on said plaintiff's title; that said claims are without any right whatever, and that said defendant has no right, title or interest whatever in or to said Lone Pine Lode Mining Claim or any in or to said Black Tail lode, [9] or any part thereof, between the said plains hereinbefore described.

XXI.

Plaintiff further avers that said Lone Pine Lode Mining Claim as hereinbefore described is of great value, to wit, of more than One Hundred Thousand ($100,000.00) Dollars, and that the value of said part of the Black Tail lode hereinbefore described, lying between the end plains of the Lone Pine lode claim hereinbefore referred to, exceeds in value the sum of One Hundred Thousand ($100,000.00) Dollars, and that portion of said lode to which defendant wrongfully asserts title and claim as hereinbefore set forth exceeds in value the sum of One Hundred Thousand ($100,000.00) Dollars, exclusive of interest and costs. That plaintiff's interest in said claim and lode exceeds in value the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

XXII.

Plaintiff further avers that some time subsequent to the 19th day of July, A. D. 1916, and while the Northport Smelting & Refining Company was the sole owner of said Lone Pine claim and the said Black Tail vein, the said defendant Lone Pine-Surprise Consolidated Mines Company did by means of secret underground workings in its exclusive possession and control wilfully and knowingly penetrate into and upon those parts of said Black Tail lode which lie between the plains hereinbefore described, and that the said underground workings of said defendant cut and intersected said Black Tail vein which contained large and valuable ore bodies of gold and silver and other valuable minerals, and said defendant wilfully and knowingly extracted and removed therefrom large amounts of said ore and minerals belonging to plaintiff, and appropriated the same to its own use, and sold the same; that the exact amount of ore so removed is unknown to plaintiff but plaintiff alleges the said amount exceeds in value the sum of One Hundred Thousand ($100,000.00) Dollars; that plaintiff has no means of ascertaining the amount and value of said ores excepting [10] by a discovery and an accounting.

XXIII.

That defendant threatens to and will unless restrained by an order of this Court extend its present workings upon said Black Tail vein and extract and remove from said lode, the property of the plaintiff, Northport Smelting & Refining Company and convert to its own use the entire value thereof to the

irreparable damage to plaintiff herein.

WHEREFORE, plaintiff prays:

1. That defendant be required to answer this complaint but not under oath, plaintiff expressly waiving the oath of defendant to the answer.

2. That defendant be required to set forth the nature of its claim in and to said portion of the vein hereinbefore described and in and to the said Lone Pine Claim that all adverse claims of the defendant may be determined by a decree of this Court; that by said decree it be declared and adjudged that said defendant has no estate or interest whatsoever in or to said Lone Pine lode claim or in or to said any portion of the said Black Tail lode or vein as hereinbefore described; that by said decree it be declared and adjudged that the title of plaintiff thereto is good and valid and the said defendant be enjoined and restrained from asserting any claims whatsoever in or to said Lone Pine Mining Claim or in or to said Black Tail lode between the plains hereinbefore described adverse to the plaintiff.

3. That said defendant, its agents, servants and employees be restrained from further penetrating in or upon said Black Tail vein or lode between said plains during the pendency of this action, and from extracting or removing from said vein any ore, earth or rock.

4. That by said final decree said defendant, its servants agents and employees be perpetually enjoined from entering upon said [11] Lone Pine Lode Mining Claim or the said Black Tail Lode be-

tween the plains hereinbefore described, or from working or mining thereon, or making or continuing in cutting, opening or excavating on or in said vein or lode, or mining ground, or any part thereof, and from removing from said mining ground or any part thereof any rock, ore or mineral substances whatever.

5. That defendant be required to account for all ores heretofore extracted from the said premises hereinbefore described and that plaintiff have judgment and decree for the value of said ore so wrongfully extracted and removed.

6. Plaintiff prays for such other and further relief as shall be meet and agreeable to equity and for costs of suit.

JOHN P. GRAY,

Residence and Postoffice Address: Coeur d'Alene, Idaho.

JOHN H. WOURMS,

Residence and Postoffice Address: Wallace, Idaho,
Solicitors and Counsel for Plaintiff.

State of Idaho,
County of Shoshone,—ss.

Jerome J. Day, being first duly sworn, on oath deposes and says:

That he is an officer, to wit, the President, of the Northport Smelting & Refining Company, the plaintiff herein; that he has read the foregoing complaint, knows the contents thereof and that the matters stated therein are true to the best of his knowledge, information and belief.

JEROME H. DAY.

Subscribed and sworn to before me this 28th day of June, A. D. 1919.

[Seal] JULIA O'ROURKE,
Notary Public in and for the State of Idaho, Residing at Wallace, Idaho. [12]

Exhibit "A."

"LONE PINE."

NOTICE IS HEREBY GIVEN that the undersigned having complied with the requirements of Chapter Six of Title Thirty-two of the Revised Statutes of the United States and the local customs, laws and regulations has located 1500 fifteen hundred linear feet on the Lone Pine quartz lode situated in Reservation Mining District, Stevens County, Washington, and described as follows:

Is 1500 linear feet in length and 600 linear feet in width, 300 feet on each side of center line. Stakes are places at each corner and each end of center line. Runs in a Northwesterly and a Southeastly direction, claim is situated about one half mile North of the Northwest fork of San Poil Creek and about two and a half miles in a southwesterly direction from O'Brien's ranch.

This notice is places at discovery. Discovery February 28, A. D. 1896. Located February 28, 1896.

Locators:
T. RYAN.
PHILLIP CREASOR.
CHARLES ROBINS.

Witness:
G. M. WELTY.
JOHN WELTY.

Filed for record Mch. 13, 1896, at 3:20 o'clock P. M., at the request of Phillip Creason and recorded April 4th, 1896.

J. S. McLEAN,
County Auditor. [13]

(M–230.)

Exhibit "B."

"LAST CHANCE" LOCATION NOTICE.

NOTICE IS HEREBY GIVEN that the undersigned having complied with the requirements of Chapter six of Title Thirty-two of the Revised Statutes of the United States and the local customs, laws and regulations has located fifteen hundred linear feet on the Last Chance quartz lode situated in Reservation Mining District, Stevens County, Washington and described as follows: Is 1500 linear feet in length and 600 linear feet in width. Posts are placed at each corner and each end of center line, and lies along the North side of the Black Tail mineral claim and the Lone Pine mineral claim, is situated about one-half mile North of the Northwest fork of the San Poil creek.

This claim lies in a northwest and southeasterly direction, 300 linear feet on each side of center line.

Discovered February 29, 1896. Located February 29, 1896.

Locators:

T. RYAN.
PHILLIP CREASON.
JAMES CLARK.
CHARLES ROBINS.

Attest:

JOHN WELTY.

Filed for record Mch. 13, 1896 at 3:20 o'clock P. M., at the request of Phillip Creasor and recorded April 4th, 1905.

J. S. McLEAN,
County Auditor.

(M–229.)

Filed in the U. S. District Court, Eastern District of Washington. July 1, 1919. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [14]

UNITED STATES OF AMERICA.

In the District Court of the United States, Eastern District of Washington, Northern Division.

THE NORTHPORT SMELTING AND REFINING CO., a Corporation,

Plaintiff,

vs.

THE LONE PINE–SURPRISE CONSOLIDATED MINING CO., a Corporation,

Defendant.

Summons.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court in the City of Spokane.

JOHN H. WOURMS,
JOHN P. GRAY,
Plaintiff's Attorney.

The President of the United States of America, GREETING: To The Lone Pine–Surprise Consolidated Mining Co., a Corporation.

You are hereby summoned to appear in the Dis-

trict Court of the United States, for the Eastern District of Washington, Northern Division, holding terms at the city of Spokane, within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, now on file in the office of the clerk of said Court, a copy of which complaint is herewith served upon you.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 1st day of July, A. D. 1919.

[Seal] W. H. HARE,
Clerk.
By H. J. Dunham,
Deputy Clerk. [15]

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within entitled action, upon the within named defendant by delivering to and leaving a true copy of the said summons and complaint with John Hoppe, at Spokane, Wash.

July 2d, 1919.

Fees: $2.06.

J. E. McGOVERN,
United States Marshal.
By J. W. Dennison,
Deputy.

[Endorsed]: No. 3255. U. S. District Court, Eastern District of Washington. Northport Smelting and Refining Co., a Corporation vs. The Lone Pine-Surprise Consolidated Mining Co. Summons. Filed in the U. S. District Court, Eastern District of Washington. July 3, 1919. Wm. H. Hare, Clerk. By H. J. Dunham, Deputy.

In the United States District Court, Eastern District of Washington, Northern Division.

IN EQUITY—No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED MINING COMPANY, a Corporation,

Defendant.

Answer.

The defendant answering plaintiff's complaint:

I.

Admits the corporate existence, organization, citizenship and residence of each of the parties hereto as alleged in paragraphs I and II of said complaint.

II.

Answering paragraph III of said bill of complaint defendant admits that this Court has jurisdiction of the parties and subject matter of the suit by reason of diversity of citizenship, character of the action,

and value of the subject matter in controversy, but denies that the construction or application of section 2332 of the Revised Statutes of the United States is involved, inasmuch as it appears upon the face of the bill of complaint that each the Lone Pine and Last Chance Lode Mining Claims were located in February of 1896; that certificate of entry for each claim was issued on February 8th, 1898; and United States patent for each was issued on the second day of March, 1899, and this defendant alleges that the period of time prescribed by the statute of limitations for mining claims in the State of Washington was during all of said years and time intervening between the dates of said respective locations and the issuance of patent therefor at [16] least seven years.

III.

Answering paragraphs IV and V and VII of said bill of complaint defendant admits that the acts of locations of the Lone Pine Quartz Lode Mining Claim were performed in the manner and at the times and by the persons as alleged in said bill of complaint, excepting that the name of James Clark is omitted from the allegations of said complaint as a locator of the Lone Pine and defendant alleges that he was one of the locators thereof.

IV.

Answering paragraph VI of said bill of complaint, defendant denies that said locators or either or any of them immediately thereafter sunk a discovery shaft upon the lode as alleged in said bill of complaint, but on the contrary defendant alleges that

there did not exist in the State of Washington at the time of the locations of said Lone Pine Lode Mining Claim any statute or law requiring the sinking of any discovery shaft but defendant admits that subsequent to the date of location of said Lone Pine Lode Mining Claim at various times several shafts were sunk by the locators and their successors in interest on various portions of said lode mining claim and that said shafts disclose various veins which exist within the boundaries of said mining claim.

V.

Answering paragraph VIII of said bill of complaint, defendant admits the allegations therein contained.

VI.

Answering paragraph IX of said bill of complaint, defendant admits that the Lone Pine Quartz Lode Mining Claim is described correctly therein.

VII.

Answering paragraphs X and XI of said bill of complaint [17] defendant admits that plaintiff is and was at the commencement of this suit, the owner of said Lone Pine Lode Mining Claim and all veins, lodes or ledges having their tops or apices therein and of all rights that lawfully appertain to said mining claim, but this defendant has neither knowledge nor belief sufficient to enable it to answer the allegations contained in said bill of complaint as to the date when said plaintiff acquired ownership or right of possession to said Lone Pine Lode Mining Claim and therefore defendant denies that at any time

prior to the filing of this suit plaintiff was the owner of or in possession or entitled to the possession of said Lone Pine Lode Mining Claim, or the rights lawfully appertaining thereto and defendant denies that plaintiff is or ever has been the owner of, or is or ever has been in possession of any of said veins or lodes or ledges or any portion thereof that exists or exist easterly beyond a vertical plane passed downward through the easterly side-line of said Lone Pine Lode Mining Claim and defendant further denies that plaintiff has or ever has had any rights whatsover to any of said veins as they extend beyond said vertical plane between the end-lines of said Lone Pine Lode Mining Claim extended in their own direction.

IX.

Answering paragraphs XIII, XIV and XV of said bill of complaint, defendant admits its ownership of said Last Chance Lode Mining Claim as therein described and the fact therein alleged relative to the location of said mining claim and the application for and issuance of United States patent thereto excepting that there are certain typographical errors in the description of said Last Chance claim as set forth in said bill of complaint.

X.

Answering paragraph XVI of said bill of complaint, defendant admits that there is within said Lone Pine Lode Mining [18] Claim a vein or lode of rock in place bearing gold, and silver and other valuable minerals and metals and defendant alleges that there are numerous veins or lodes of rock in

place bearing gold and silver and other valuable minerals and metals existing in said claim but defendant denies that any of said veins or lodes is commonly known as or called the Black Tail Lode or that the top or apex of said alleged Black Tail Lode or any lode crossed the southerly end-line of said Lone Pine Lode Claim or that it proceeds in a northerly or in any direction in said claim or that it crosses the easterly side-line of the Lone Pine claim at a point about 618 feet north from the southeast corner of said Lone Pine Lode Mining Claim or crosses any point on the easterly side-line of said claim or that it continues until it crosses the west boundary of said Last Chance Lode Mining Claim.

Defendant alleges that among the many veins existing within the boundaries of the Lone Pine Lode Mining Claim there is a vein commonly known as the "Lone Pine No. 2" vein which vein has been extensively mined by plaintiff and its predecessors in interest and that this vein extends through said Lone Pine Lode Mining Claim on a course or strike substantially at right angles to the length of said claim and that it crosses the easterly side-line of said Lone Pine claim at a point approximately 575 feet north from the southeast corner of said claim, making an angle of nearly 70 degrees with said side-line and thence continues until it crosses the west boundary of said Last Chance Lode Mining Claim; and defendant further avers that said vein last described does not at any point cross the southerly end-line of said Lone Pine Lode Mining Claim but that its course or direction is across the length of said Lone

Pine claim and not along or in the same direction as the length of the said Lone Pine claim.

Defendant is informed and believes, and therefore avers, that plaintiff asserts and pretends that the vein hereinabove [19] last described as the Lone Pine No. 2 vein is the vein alleged in its bill of complaint to be the so-called Black Tail vein, but this defendant denies that they are the same vein and on the contrary defendant alleges that the so-called Black Tail vein is an entirely different and distinct vein belonging to a distinct vein system and existing within the boundaries of the Black Tail Lode Mining Claim lying to the south of the Lone Pine Lode Mining Claim and that it is no part or in any way connected with the said Lone Pine No. 2 vein and that the strike and course of said Black Tail vein is substantially at right angles to the course and strike of said Lone Pine No. 2 vein.

And further answering said bill of complaint defendant alleges that there are several distinct and separate veins, lodes and ledges which together with their respective apices exist within the surface boundaries of said Lone Pine Lode Mining Claim, including the vein on which the discovery of said Lone Pine Lode Mining Claim was made and which discovery has been identified in said bill of complaint, by the discovery cut which bears north 51′ west 670.8 feet distant from corner No. 1 of said claim, and which discovery vein is a distinct vein from said Lone Pine No. 2 vein. That each of said veins or lodes, including the discovery vein, and each of the respective apices thereof, has a course and extends

substantially across said Lone Pine Lode Mining Claim and in a direction substantially at right angles to the surveyed lode line and the side-lines thereof and also substantially at right angles to the Black Tail vein, also herein described and that none of said veins in said Lone Pine claim has a course or direction even approximating the direction of the length of said claim and that practically all of said veins and the apices thereof including said discovery vein cross both opposite side-lines of said Lone Pine Lode Mining Claim. [20]

XI.

Answering paragraph XVII of said bill of complaint defendant denies that the Black Tail vein is found extending on its downward course or otherwise or at all between planes drawn vertically and parallel to the end-lines of said Lone Pine claim extended easterly in their own direction or that said vein extends indefinitely or at all easterly or beyond a vertical plane drawn downward through the west boundary line of said Last Chance Lode Mining Claim or that said vein so far as known to plaintiff, passes underneath the surface of said Last Chance Lode Mining Claim.

Defendant alleges, however, that the Lone Pine No. 2 vein described hereinabove does pass on its downward course beyond the easterly side line of said Lone Pine claim and that the direction of its true dip is south, between 40° and 50° east and that it passes underneath the surface of said Last Chance Lode Mining Claim and that it enters said Last Chance claim on its strike.

XII.

Answering paragraph XVIII of said Bill of Complaint defendant repeats and reiterates the denials, admissions and allegations contained in paragraphs VIII, X, and XI of this answer and further denies that plaintiff is the owner in fee or otherwise or in possession of or entitled to the possession of any vein or lode or of any portion thereof throughout its entire depth or at all between planes drawn downward vertically and parallel to the end-lines of said Lone Pine Lode Mining claim and extended easterly in the direction of the end-lines of said Lone Pine claim.

XIII.

Answering paragraph XIX of said bill of complaint, defendant denies that it claims or has claimed an estate or [21] interest adverse to plaintiff's in or to said Lone Pine Mining Claim or in or to anything which lawfully pertains to said claim, or any part thereof between vertical planes drawn downward through the end-lines of said Lone Pine Lode Mining Claim and said end-lines extended easterly in their own direction or otherwise and defendant expressly disclaims any right thereto but defendant repeats and reiterates what it has alleged and set forth hereinbefore regarding its ownership of said Lone Pine No. 2 vein as it extends into said Last Chance Lode Mining Claim and defendant claims all parts and portions of said vein as it exists vertically beneath the surface of said Last Chance Lode Mining Claim.

XIV.

Answering the matters and things set forth and

alleged in paragraph XX of said bill of complaint, defendant reiterates and repeats what it has heretofore said in paragraph XIII of this answer.

XV.

Answering paragraph XXI of said bill of complaint, defendant denies that either said Lone Pine Lode Mining Claim or said Black Tail Lode as described in this answer is of a value of One Hundred Thousand Dollars ($100,000.00) or any sum approaching said amount, their exact value being unknown to this defendant, but defendant admits that that portion of the Lone Pine No. 2 vein which exists vertically beneath the surface of its Last Chance Lode Mining Claim and which it is the owner of as alleged herein, is of a value in excess of One Hundred Thousand Dollars ($100,000.00), and defendant admits that the segment of vein and ore bodies here in controversy exceed in value the sum of Three Thousand Dollars ($3,000.00).

XVI.

Answering paragraph XXII of said bill of complaint defendant denies that it has at any time since July 19, 1916, by means of secret or any underground workings penetrated into the [22] Lone Pine Lode Mining Claims, or into any portion of the Black Tail lode which lies between the planes described in said Bill of Complaint or that defendant has at any time or in any manner extracted any ore or minerals therefrom; but defendant alleges that as owner of its Last Chance Lode Mining Claim, it has for upwards of three years last past been engaged in mining and extracting and removing ore from said Lone

Pine No. 2 vein as it exists vertically beneath said Last Chance claim; that none of said ore so mined and removed by defendant is a part of either the Lone Pine Lode Mining Claim or of the Black Tail vein, all of which is more fully alleged hereinbefore, and defendant further alleges that all of its mining of said Lone Pine No. 2 vein beneath said Last Chance claim has been conducted without any attempt at secrecy or concealment from plaintiff, of any of the facts regarding the same, but that plaintiff either knew or could have known by inquiry the nature and situs of the mining carried on by defendant during all of the time it has been mining as aforesaid.

XVII.

Answering paragraph XXIII of said bill of complaint defendant denies that it threatens to or will unless restrained by order of this Court extend its workings upon the Black Tail or any lode owned by plaintiff or remove or extract ore therefrom or perform any act that will in anywise injure plaintiff or cause it any loss or damage whatsoever, but, on the contrary, defendant alleges that it will at all times, as it has in the past, confine its activities and mine workings to the ores, veins and mineral deposits of which it is the sole and exclusive owner as in this answer set forth.

WHEREFORE, defendant prays that plaintiff take nothing by this action, that its bill of complaint be dismissed, and that defendant recover costs.

FRED S. DUGGAN,
WM. E. COLBY,
Attorneys for Defendant. [23]

State of Washington,
County of Spokane,—ss.

Chas. P. Robbins, being first duly sworn, on oath deposes and says:

That he is an officer, to wit, The President of the Lone Pine Surprise Consolidated Mining Company, the defendant herein; that he has read the foregoing answer, knows the contents thereof and that the matters stated therein are true to the best of his knowledge, information and belief.

CHAS. P. ROBBINS.

Subscribed and sworn to before me this 22d day of September, 1919.

FRED S. DUGGAN,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed in the U. S. District Court, Eastern District of Washington. October 1, 1919. Wm. H. Hare, Clerk. By Helen G. Ogle, Deputy. [24]

In the United States District Court, Eastern District of Washington, Northern Division.

IN EQUITY—No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED MINING COMPANY, a Corporation,

Defendant.

Decree.

This cause came on to be heard at this term and was duly submitted to the Court for determination and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows, viz:

The Court finds in favor of the defendant and adjudges and decrees that plaintiff take nothing by its complaint herein; that its bill be dismissed, and that defendant do have and recover of the plaintiff its costs which are taxed at $817.00.

Dated December 14th, 1920.

FRANK H. RUDKIN,
District Judge. [25]

In the United States District Court, Eastern District of Washington, Northern Division.

IN EQUITY—No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED MINING COMPANY, a Corporation,

Defendant.

Notice of Presentation of Decree.

To the Above-named Plaintiff, and to John P. Gray and John H. W. Wourms, Its Attorneys:

You will please take notice that on Tuesday, the

14th day of December, 1920, at ten o'clock A. M., at the courtroom of the above-entitled court at the city of Spokane, Washington, the defendant will present to the Court the attached form of decree for signing and entry in the above-entitled action.

Dated December 4th, 1920.

WM. E. COLBY,
FRED S. DUGGAN,
Attorneys for Defendant.

Service of the foregoing notice and attached form of proposed decree is hereby admitted on us this 9th day of December, 1920.

JOHN P. GRAY,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Dec. 14, 1920. W. H. Hare, Clerk. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED MINES COMPANY, a Corporation,

Defendant.

Opinion.

JOHN P. GRAY, and JOHN H. WOURMS, Attorneys for Plaintiff.

WILLIAM E. COLBY and FRED S. DUGGAN, Attorneys for Defendant.

RUDKIN, District Judge.

This is a suit to quiet title, for an injunction and for an accounting. The property involved is the segment of a vein or lode, bearing gold and silver, within the surface boundaries of the Last Chance Lode Mining Claim in the Republic Mining District. It appears from the bill of complaint that on the 28th day of February, 1896, the predecessor in interest of the plaintiff discovered a vein or lode bearing gold and silver and other valuable minerals and metals on vacant, unoccupied public lands of the United States, in what is now Ferry County, in this State; that on the same day they located the Lone Pine Quartz Lode Mining Claim by posting the usual notice at the point of discovery, and sunk a discovery shaft on the lode, disclosing a vein of quartz ore with one well-defined wall; that they immediately marked the location on the ground as required by law, and thereafter continued in the open, notorious and uninterrupted possession thereof; that they made application for patent in 1897, final proof and payment February 8, 1898, and received a patent under date of March 2, 1899; that on the 19th day of July, 1916, the plaintiff succeeded to the right and title of the original locators, by mesne conveyances, and [27] is now the owner of the

claim and of all veins, lodes or ledges having their apices therein throughout their entire depth; that subsequent to the 29th day of February, 1896, the predecessors in interest of the defendant located the Last Chance lode mining claim, lying east of the Lone Pine claim, and received a patent therefor under date of March 2, 1899; that within the Lone Pine claim is a vein or lode of quartz bearing gold and silver and other valuable minerals and metals, known as the Blacktail vein; that the top or apex of the Blacktail vein crosses the southerly end-line of the Lone Pine claim, and extends in a northerly and easterly direction through the claim, passing out of the east side-line at a point 618 feet north of the southeast corner; that the course of the vein is easterly on its downward course, and the plaintiff is the owner of the vein throughout its entire depth between planes, drawn downward vertically, from the south end-line and the point where the vein crosses the east side-line; that the defendant claims an estate or interest therein, and through secred underground works has extracted ore therefrom to the value of $100.000.00.

The answer puts in issue the right and title of the plaintiff. The following rough sketch will illustrate, in a general way, the location of the different claims, and the course or strike of the different veins found therein: [28] The plaintiff contends that the vein designated on the plat as Lone Pine No. 2 is an extension or continuation of the Blacktail vein; that the Blacktail vein enters the south end-line of the Lone Pine claim and passes out

through the easterly side-line; that the downward course or dip of the vein is in an easterly direction and that the plaintiff is, therefore, the owner of the vein or segment in dispute throughout its entire depth. The defendant, on the other hand, contends: First, that the discovery vein crosses both side-lines of the Lone Pine claim; that the side-lines therefore become the end-lines, and that the end-lines thus established remain the end-lines for all purposes, and determine the question of extralateral rights on all veins found within the surface boundaries; second, that Lone Pine vein No. 2 is not an extension or continuation of the Blacktail vein and does not pass or cross beyond the south end-line of the claim; third, conceding that the Blacktail vein crosses both the south end-line and the east side-line, the plaintiff is nevertheless attempting to pursue the vein on its course or strike and not on its downward course or dip.

It is well-settled that the end-lines fix the limits beyond which the locator may not go in the appropriation of any vein or veins along their course or strike, but within the meaning of this rule the end-lines are not always those fixed or adopted by the locator. As said by the Supreme Court in Del Monte Mining Co. vs. Last Chance Mining Co., 171 U. S. 55, 89:

> "Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; Second, the end-lines, as he marks them on the surface. with the single

exception as hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side-lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end-lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where [29] it is developed that in fact the location has been placed not along but across the course of the vein. In such case, the law declares that those which the locator called his side-lines, are his end-lines, and those which he called end-lines are in fact side-lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location."

Or, as said by Mr. Justice Miller, in his charge to the jury in Stevens vs. Williams, 1 McCrary, 480, 490.

"The plaintiff is not bound to lay his side-lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may

be so run that he crosses it the other way. In such event, his end-lines become his side-lines, and he can only pursue it to his side-lines, vertically extended, as though they were his end-lines, but if he happens to strike out diagonally, as far as his side-lines include the apex, so far he can pursue it laterally."

And in Walrath vs. Champion Mining Company, 171 Id., 293, 307, after quoting the language of Mr. Justice Field, in Iron Silver Mining Co. vs. Elgin Mining Co., 118 U. S. 196, 198, the Court said:

"The Court, however, did not mean that the end-lines, called such by the locator, were the true end-lines, but those which 'are crosswise of the general course of the vein on the surface.'"

It is equally well settled that end-lines once established cannot thereafter be changed or, as said by the Circuit Court of Appeals for this Circuit in St. Louis Min. & Mill Co. vs. Montana Min. Co., 104 Fed. 664:

"As to the first contention, it is a well-settled proposition that a mining claim can have but two end-lines, and that, end-lines having been once established, they become the end-lines for all veins found within the surface boundaries."

It was conceded at the trial, or at all events there is no controversy over the fact that the strike of the discovery vein on the Lone Pine claim is substantially parallel to the end-lines of the claim and that the discovery vein passes out through and beyond both side-lines. Under these facts, had the

present controversy arisen under the Act of 1866, extralateral rights would unquestionably be limited by the side-lines and not by the end-lines, for under that Act the grant was limited to the discovery [30] vein or lode and was likewise limited by the surface boundaries. As said in Walrath vs. Champion Mining Co., 63 Fed. 552, 556:

> "The locators were only required to designate the lode in their notice of location. The lode was the principal thing. The surface ground was a mere incident thereto, for the convenient working thereof."

The Act of 1872, carried into the Revised Statutes as section 3222, made certain changes in the Act of 1866 and extended the grant to the exclusive right of possession and enjoyment in the locator of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of the surface location. But did this change in the law work any change in the existing rule as to end-lines and side-lines, or as to the mode or manner of their ascertainment? It would seem not. Thus, in Walrath vs. Champion Mining Co., 63 Fed. 552, Judge Hawley said:

> "The Act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the Court with any

authority to make new end-lines for such other veins, and it is apparent from an examination of the statute that the Court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end-lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location."

The decree in this case was modified in one unimportant particular by the Circuit Court of Appeals, 72 Fed. 978, and affirmed by the Supreme Court of the United States, 171 U. S. 293, under the same title. This language of Judge Hawley was quoted with approval by Judge Gilbert in Montana Mining Co. vs. St. Louis Min. & Mill Co., 102 Fed. 430. In that case the Court said:

"It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein, which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vien, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end-lines, or that it runs lengthwise [31] of the claim, rather than across, or that it dips in any given direction, and that for want of these allegations the complaint wholly fails to show a right in the

> defendant in error to pursue beyond its vertical side-lines the vein from which the ores in controversy were taken."

The learned Judge did not question the correctness of the proposition that extralateral rights on all veins within the surface boundaries are controlled by the course or strike of the discovery vein, but proceeded to show that the complaint contained the further distinct allegation that the defendant in error was the owner of the vein from which the ores in controversy were extracted, and therefore stated a cause of action and was sufficient to support the judgment.

In the leading case of Mining Co. vs. Tarbet, 98 U. S. 463, after a reference to the Act of 1866, Mr. Justice Bradley said:

> "The Act of 1872 (17 Id. 91) is more explicit in its terms; but the intent is undoubtedly the same, as it respects end-lines and side-lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; that the end-lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side-lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein

at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side-lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side-lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side-lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side-lines of the location are really the end-lines of the claim, considering the direction or course of the lode at the surface."

In Walrath vs. Champion Mining Co., 171 U. S. 293, the Supreme Court said:

"Appellant's right upon the Contact vein is given by [32] this statute. What limits this right extralaterally? The statute says vertical planes drawn downward through the end-lines of the location. What end-lines? Those of and

as determined by the original location and lode, the Circuit Court of Appeals decided. Those determined by the direction of the newly discovered lodes, regardless whether they were originally intended as end-lines or side-lines, the appellant, as we have seen, contends. The Court of Appeals was right. Against the contention of the appellant the letter and spirit of the statute oppose, and against it the decisions of this Court also oppose.

"The language of the statute is that the 'outside parts' of the veins or lodes 'shall be confined to such portions thereof as lie between vertical planes drawn downwards * * * through the end-lines of their locations * * * .'"

Counsel for plaintiff call attention to the fact that there was in that case but one original vein and that the claim was located under the Act of 1866. True, the claim was located under the Act of 1866, but it is equally true that the Court was construing the Act of 1872, for after quoting section 3 of that Act, the Court said: "Appellant's right in the Contact vein is given by this statute." Furthermore, in an earlier part of the same opinion, the Court quoted with approval the language of Mr. Justice Bradley in the Tarbet case, to the effect that the intent of the two Acts with reference to end-lines and side-lines is one and the same. In the same opinion the Court makes use of the following language upon which the plaintiff apparently places much reliance: "These propositions we affirm, with the addition that the

end-lines of the original veins shall be the end-lines of all the veins found within the surface boundaries."

It is argued that the Court here had reference to original veins within the surface boundaries of a single claim, but this argument seems rather tenuous and farfetched. If all veins within the surface boundaries had in fact the same end-lines or side-lines, or paralleled each other, no question could arise as to the extralateral rights, because such rights would be the same, whether one or another vein was controlling. If, on the other hand, one vein crossed the side-lines and another the end-lines, as is the claim here, the statement would seem meaningless and contradictory, because the original veins could have no common [33] side-lines or end-lines. The statement, however, follows the quotation of the summary of Mr. Justice Brewer in the Del Monte case, and inasmuch as the learned Judge there referred throughout to a single vein or lode, I am of opinion that the statement was added for the purpose of making clear the proposition that extralateral rights on all veins are controlled by the same set of end-lines. The terms principal, original, primary, secondary, accidental and incidental have all been employed at different times to describe the different veins found within the same surface boundaries, but their meaning is not entirely clear in all cases. They may refer to the relative importance or value of the different veins or to their relations to each other; they may refer to the time of discovery; or they may well be

used to distinguish between the discovery vein and other veins within the same surface boundaries, and beyond question they are most frequently used in this latter sense. Thus in an earlier part of the opinion in the Walrath case, the Supreme Court refers to "the original location or lode" and in a later part, to the strike or dip of "The original vein." In the first instance, the Court seems without doubt to refer to the discovery vein because it speaks of the original location or lode, and there is nothing in the context to indicate that the word was used in any different sense in other parts of the same opinion.

But the chief reliance of the plaintiff is the decision of the District Court, in Clark-Montana R. Co. vs. Butte & Superior Copper Co., 233 Fed. 547. It appears from the map or plat found in the opinion in that case that the Jersey Blue vein crosses the west end-line of the Blackrock claim, and that the Rainbow, or discovery, vein crosses both side-lines of the same claim. The Court held that extralateral rights were controlled by the course or strike of the Jersey Blue vein, rather than by the course or strike of the discovery vein, merely saying: [34]

> "Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. Extralateral rights based on it extend east beyond where the like right based on the Rainbow begin. Indeed, taking the course of the Jersey Blue where fixed by plaintiff south of the Rain-

bow, it is probable it crosses the Blackrock south side-line east of the Elm Orlu east end-line. That the Rainbow crosses both side-lines is not controlling. There can be but one set of end-lines, and if the located end-lines fix extra-lateral rights upon one vein, as they do upon the Jersey Blue, they fix them upon all veins."

Ordinarily, I would feel constrained to defer to the superior knowledge and experience of the learned Judge who wrote that opinion, in matters of this kind, but if the question here involved was at all decisive of the rights of the parties in that case, I confess I cannot understand why it should receive such scant consideration at the hands of the Court in a well-considered opinion, or why the question was not even referred to by either of the Appellate Courts to which the case was carried.

248 Fed. 609;

249 U. S. 11, where the title of the case was reversed.

The decision, itself, is out of harmony with the language of the Courts in the many extralateral right cases decided during the last half century. In all of these cases it seems to have been taken for granted, if not decided, that the principal effect of the Act of 1872, was to extend the grant so as to include all veins or lodes having their top or apex within the surface boundaries, but with the same end-lines, the same side-lines, and the same extra-lateral rights as properly appertain to the discovery vein, which forms the basis of the location and patent. Counsel for plaintiff concede that the

course or strike of other veins have no controlling effect unless their presence was known at the time of location, but the testimony in this case amply demonstrates the danger of making valuable property rights dependent upon what was known or unknown a quarter of a century ago. Furthermore, there was no known vein extending lengthwise of the Lone Pine claim at the time of location, or even at the time of patent. There was nothing on the surface to indicate that the Blacktail vein extended that far to the north, [35] and while vein No. 2 was, perhaps, known at the time of discovery and was certainly known very soon thereafter, yet that vein, so far as then known, extended crosswise of the claim, and there was not even a suspicion until years afterwards that it turned abruptly to the south, almost at right angles, and crossed the south end-line, if, indeed, that fact can be said to be established at this time. If the contention of the plaintiff is correct, the discovery vein on the Lone Pine claim has no extralateral rights. It could not be pursued along the strike or course of the vein beyond the north end-line of the claim. I fail to see how the right of the owner of the claim to pursue the vein on its downward course or dip beyond the end-line could be defeated except by some person showing a prior right. If this is true, why should side-lines or end-lines now depend upon the fortuitous circumstance that it has recently been discovered that vein No. 2 in fact crosses the south end-line. The locators of the Last Chance claim knew that the discovery vein on the Lone Pine crossed

the side-lines and they had a right to assume, therefore, that no extralateral rights would ever be asserted in that direction.

These views seem in entire harmony with all law-writers on the subject. Thus, in discussing the different classes of veins within the same surface boundaries, Judge Lindley says:

> "One thing seems quite certain—the law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to which one was discovered first—that is, which vein was the basis of the location—and there exists to this extent a distinction between the two classes of veins."
>
> Lindley on Mines, 3d ed., sec. 594.

Commenting on this statement in the Harvard Law Review, Mr. Henry Arnold says:

> "In other words, where two veins are found to apex within the surface territory of one location, no distinction is to be drawn between them, but both are to be treated as of equal dignity—unless a question arises as to some point concerning, or dependent on, the drawing or character of the boundaries, of the location, in which event, but in which event only, inquiry as to which is the discovery vein (that is, as to which vein served as [36] the basis of location) becomes of moment."
>
> 22 Harvard Law Review, 278.
>
> "Extralateral rights on secondary (incidental) veins— that is, on veins other than the discovery (original or principal) vein—are de-

termined with reference to those lines, which for the discovery (original or principal) vein's extralateral rights are the end-lines of the claim."

Costigan on Mining Law, p. 440.

"There can be but one set of end-lines for all the veins covered by the patent, and where departure from one or both side-lines renders it material, only the discovery vein can be used to determine what are the planes of the end-lines."

Morrison's Mining Rights, 15th ed., p. 215.

The doctrine of extralateral rights has been the subject of more or less criticism in the past. All the authorities agree that side-lines and end-lines do not depend on the mere act of the locator, and if it is now held that they do not depend on the course or strike of the discovery vein another element of uncertainty is introduced and the administration of the mining laws will become still more vexatious and difficult.

If I am correct in these conclusions, the plaintiff can assert no extralateral rights beyond the east sideline of the Lone Pine claim, and it becomes unnecessary to discuss or consider the debatable questions whether a connection between vein No. 2 and the Blacktail vein has been established with the degree of certainty required by law; or whether the plaintiff is seeking to follow or pursue the vein on its course or strike rather than its downward course or dip. I reach this conclusion with the less hesitation because it leaves both parties in the full possession and enjoyment of all rights claimed by them and their predecessors in interest for more than twenty

years after the location of their respective claims.

For the reason stated the bill of complaint should be dismissed, and it is so ordered.

Let a decree be entered accordingly.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 3, 1920. W. H. Hare, Clerk. [37]

No. 3255. Statement of Facts. Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.

In the United States District Court, Eastern District of Washington, Northern Division.

IN EQUITY—No. 3225.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

v.

LONE PINE-SURPRISE CONSOLIDATED MINING COMPANY, a Corporation,

Defendant.

Before Hon. FRANK H. RUDKIN, Judge.

APPEARANCES:

For the Plaintiff: Mr. JOHN P. GRAY.
Mr. JOHN H. WOURMS.

For the Defendant: Mr. FRED S. DUGGAN.
Mr. W. S. COLBY.

Statement of Facts.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial in the above-en-

titled court on Monday, August 23d, 1920, before Hon. FRANK H. RUDKIN, Judge, the plaintiff being represented by its attorneys, Mr. John P. Gray and Mr. John H. Wourms, the defendant being represented by its attorneys, Mr. Fred S. Duggan and Mr. W. S. Colby; whereupon the following proceedings were had: [3]

INDEX.

Mr. GRAY.—May it please your Honor: The suit is one to quiet title; that is, to quiet title to the extralateral portion of the vein called the Black Tail vein which apexes in part in the Lone Pine Mining Claim, and for a considerable distance in the Black

Tail Mining Claim, which dips downward beneath the Last Chance Mining Claim; and it is to that portion of the vein beneath the Last Chance or extralateral portion between the plane of the south end-line of the Lone Pine and a parallel plane drawn thereto at the point of departure of that vein through the side-line. The vein from the east side-line passes into the claim through the south end-line, and out of the plane through the east side-line.

The evidence will show that in the beginning of the mining claims at Republic, two of the first claims located were the Quilt, which lies just south of the Black Tail, and the Black Tail; subsequently the Lone Pine and later the Last Chance were located.

The Black Tail vein is a large quartz vein, and one can stand upon the surface and see clearly traversing the country in a general northerly direction, it passes through the north end-line and over into the Lone Pine Claim. The locators of the Lone Pine visited the Black Tail discovery. They were shown the croppings of the vein there by the locator who was upon the ground, and were told that the ground on the north end was open to location. Thereupon they went over and located the Lone Pine claim. The claim is located in a general northerly and southerly direction. At the time of the location, there was cropping out, at a point which will be described to your Honor, but approximately at the point where I now point to your Honor, a large quartz vein. [4] The veins in that locality, which was well known to the locators at that time at a general northerly and southerly direction.

Passing up the hill, they found outcropping a vein material at a point which is marked on this map "Discovery cut" by patent notice, and on up northerly they also found croppings clear up to the north end-line of the claim. In other words, the locators who went upon there, finding croppings of what is really the Black Tail vein and finding other croppings and vein material on up the hill, located the claim as they assumed covering the strike of this Black Tail vein. The discovery notice was placed at the point midway between these end lines where I now hold my pointer. At that place there is disclosed now some small stringers of quartz. There they posted their notice. Those stringers of quartz, the evidence I think will show, through crossovers from one stringer to another in one way or another can be followed from stringer to stringer until probably a direct connection can be made of quartz, among the various stringers which were developed in that block of ground over to the side-line. The Black Tail vein showing there may be called a vein because it is what miners recognize as a small quartz vein, but it has no commercial value, and the croppings up near the north were all primary veins of the Lone Pine Claim discovered at a prior time to the location of the [5] claim and are discovery veins of that claim. This vein here was known, and was really the principal object in making the location. The principal object in making the location was to acquire this extension. The Black Tail cropping out there and there (indicating), and the first work that these gentlemen who made the location did was upon

this claim here. Later it was patented. The mineral surveyor who made the patent survey also went up the hill, following the way that the old prospectors had gone, and he determined that this vein extended lengthwise of the claim. Anyway at the time of his patent survey, that was his opinion, and that is the evidence upon the ground. Later developments showed, however, that as a matter of fact instead of that extending on up through the claim, it bends around and passes out of the side-line. Now, we claim that we have the right to follow that vein from its dip or downward course beneath the surface of the adjoining property. [6]

In order that your Honor may have a general idea of the defense, my friends on the other side of the table assert that as a matter of fact there are two veins, that this vein comes over here and I don't know what happens to it—they will perhaps explain it to you—and the vein—the ore which is now in the vein to which I am pointing is a separate and distinct vein and passes out of the claim at its side-line and is not a part of the Black Tail.

They also assert in their answer that the discovery vein of the claim is the vein where the notice was posted and that that passes out through the side-lines of the claim, and that there can be but one set of end-lines. Therefore, what they term the discovery veins passes out the two side-lines; that there can be no extralateral rights except through the end-lines. We will be in this agreement upon that point I assume because as I say it is our contention that the veins as found by the locators at

the time they made the location are all primary veins.

I think that is a brief outline of the facts in this case.

I should say to your Honor that there is no disagreement between us upon the surveys. We have compared them and in matters of that kind there is no controversy.

The COURT.—I don't know what this case is about, but I will inform you in advance that I expect to limit to a reasonable extent the number of what is entirely expert witnesses. I don't know how many you expect to call.

Mr. GRAY.—I expect to call Mr. Searles to go completely over this and the other witnesses will be short.

The COURT.—I think half a dozen experts on each side can prove or disprove as much as a million. [7]

WHEREUPON, the following testimony was offered on behalf of the plaintiffs:

Testimony of Fred Searles, Jr., for Plaintiff.

FRED SEARLES, Jr., a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. State your name, residence and occupation.

A. My name is Fred Searles, Jr.; I reside at Nevada City, California; my occupation is that of a mining geologist.

(Testimony of Fred Searles, Jr.)

Q. Where were you trained for the practice of your profession and what experience have you had?

A. I received my technical education in the profession of a mining geologist at the University of California, from which institution I graduated from the Department of Mining and Geology in 1909. For some years prior to that time I had been engaged in the mining business in the sense that I worked underground in the mines in California as a practical miner, mucker and various capacities. Subsequent to graduation, I spent a year at the University of California as an instructor in mineralogy and geology and thereafter entered upon the practice of the profession of a mining geologist. In the course of the practice of that profession I entered employment with the Goldfield Consolidated Mining Company as its geologist and I continued in that capacity for more than four years. During the same period I was geologist for the Mason Valley Copper Company and examined the properties for the Canadian Exploration Company and certain exploration companies of the Gunn-Thompson people [8] and became familiar with most of the mining camps and mining districts in the states of Nevada and California. During and subsequent to that time I have also become familiar with a large number of mines in all of the other mining states of the United States, in Canada, in Ontario and British Columbia and Alaska and Mexico. In 1913 I spent some time in studying the gold veins of the Rand district in

(Testimony of Fred Searles, Jr.)

South Africa and the diamond mines in that country. I spent a year in prospecting and exploration work in China, Sumatra and other parts of the Dutch East Indies and I am familiar with portions of the Malay Peninsula. I continued the practice of this profession until June, 1917. From that time until July, 1919, I was otherwise engaged. Since that time I have practiced the same profession continuously and am at present engaged in consulting work in advising and directing the development and exploration of certain silver deposits in Mexico and two small gold mines in California.

Q. Are you operating the gold mines yourself?

A. Yes, I am operating two small gold mines in Sierra County, California. I think that answers the question.

Q. Have you developed any of these mines yourself, taken hold of them and developed them?

A. These mines in Sierra County that I am operating now I became interested in as a result of finding that some of the high-grade ore bodies in an abandoned mine were cut off by some post-mineral faults and in the development a segment of these veins was overlooked in the prior operations. Some very rich ore has been encountered. [9]

Q. Have you visited the mining properties of the plaintiff and defendant at Republic?

A. Yes, sir, I have visited, I believe all of the accessible workings in the Last Chance and Surprise and Lone Pine claims and portions of those in the Black Tail and Pearl claims, having spent

(Testimony of Fred Searles, Jr.)

in the study of these mines about eleven days.

Q. Before I proceed to the discussion, I wish you would state to the Court the color scheme which is used upon the maps.

A. On all the maps except the composite map the red color is used for the designation of the vein material. The green lines on the surface map are contours showing the configuration of the surface. The black lines are claim lines; and in the case of the underground map, show the boundaries of the workings. I might say concerning the composite map, Plaintiff's Exhibit 2, that due to the relatively simple nature of this ore deposit it was thought unnecessary to submit separate level maps showing the condition and structure existing on each level, and that these conditions are shown on one map which shows all of the levels. In order to distinguish between the levels shown on that composite map it has been found necessary to put some color on the levels so that they may be readily distinguished. These colors have nothing to do with the structure of the ground. But the red lines and the blue lines shown crossing these workings in the various places indicate, respectively, the vein and gouges or faults, fissures, which are disclosed on these workings. [10]

Q. Will you state to the Court what you have found upon the premises in controversy, the character of the rocks, the character of any vein or veins which you have found there, their course and strike, the relation which they bear to the lines of the

(Testimony of Fred Searles, Jr.)

claims. In doing so, to cover the field which you have observed, use such maps or exhibits as are upon the wall or which you may desire to produce.

A. The country rock in which the Lone Pine, Black Tail and Last Chance mines occur, is what is known as andesite breccia. That means a rock which was poured out from a volcano in such a way that the liquid portions of the lava solidified at different times so that the liquid portions got mixed up with some parts of the rock which had already been chilled, so that the result shows all through this rock a structure of elastic or fragmentary breccia. I have a sample of this rock marked for identification "A." This was taken from the 300 level of the Pine, and shows the general character of this rock, the fragmentary nature, the angular fragments surrounded by other rock which is consolidated from a liquid condition.

Now, there are a number of interesting things about that rock, but the attribute which I wish to emphasize particularly is that in spite of the nature of its manner of accumulation and the brecciation which is observable in small specimens, the entire mass of rock is singularly homogeneous. I mean by that it does not have within it [11] planes of stratification or planes which are referable to the manner in which it was accumulated, such as, for instance, the bedding planes in sandstone and quartzite. The whole mass of rock subsequent to its consolidation was a massive homogeneous material.

(Testimony of Fred Searles, Jr.)

Now, one well-known fact in dynamic geology is that when a rock of that kind which is homogeneous and without plane of easy slipping is subjected to a very—

Q. Mark that rock our Exhibit No. 5, if you please. You can mark it later and go right on.

A. When the accumulation of homogeneous rock such as this is is subjected to excessive compressive stresses, such as a force of compression so great that the rock cannot stand it, compression mounting up to a point that exceeds the elastic limits of the rock, there are set up in it two series of conjugate fissures neither of which is parallel to the direction of stress. The action is entirely similar to what takes place in block of granite that we put in a testing-machine and stress until it fails. Under that condition a block of granite with enormous pressure brought in a given direction on it, there are set up cracks in the granite the general direction of neither of which is parallel with the force but which makes such an angle that the direction of the force is at the bisectrice of the angle of intersection. Now, if we think of a mass of this andesite breccia which has been acted upon by an enormous compressive force— [12] I would like to draw a sketch which would show what would happen. (Witness drew sketch.) Suppose we have such an accumulation of rock on the lower side of the line which I marked A–B on this sheet which will be—

Q. No. 6?

A. Marked Exhibit No. 6. Suppose that that block

(Testimony of Fred Searles, Jr.)

of rock is affected by an enormous stress from this direction, as, for instance, if an intrusion of some other rock were forced into the country over in this direction, there would be set up in this rock lines of fracture which are essentially parallel or sub-parallel and which run in two directions, something as shown by the black lines going in the two directions on this exhibit. Now, there are certain things to note about structure in a rock which is formed by this method. One of the interesting things is that these two systems of cracks are formed essentially at the same time. They are quite strictly contemporaneous. They result from a strain on the rock so great that it cannot stand it and suddenly these cracks shoot out just as in the case of a piece of glass or ice that is compressed by some shock to a point that it can no longer stand. Now, when these cracks are formed in a rock they don't constitute a vein, of course, but if we think of a mass of rock there which has been affected by a structure of that kind as being saturated [13] with hot mineral solutions emanating possibly from an intrusion over here, the entrance of which gave rise to the structure itself, then each of these little cracks and crevices, the major fissures and the very pores and interstices of the rock itself become full and saturated with these solutions, but the solutions act on everything that they come in contact with. The rock itself between the fissures is altered by these solutions, the felspars in the andesite are changed, pyrite is introduced, but along the fissures

(Testimony of Fred Searles, Jr.)

where circulation exists the action is more vigorous and it can be easily shown that the quantity of solutions which circulate along long fissures, major fractures in a rock, is very, very greatly in excess of the solutions which come in contact with the small cracks which have only a short extent either in the direction of the strike of the dip. That is largely because of friction. The amount of solution that circulates along a fissure a thousand feet long, may easily be millions of times as great as that which comes in contact with a little crack which has only a short extent, and the result is that in the small cracks and fissures, we have deposits from these solutions, small veins. I show a little red along this minor crevice in the cracks indicating that a certain amount of quartz and vein material is deposited there, but to form an important vein it takes a very large quantity of solutions, because mineral vein solutions are dilute, and to form a thousand [14] tons of quartz, we have to have a great many thousands of tons of solutions. Now, it may easily happen, and does happen, and has happened in this instance, that where certain of these conjugated fissures come together, we may have the quartz and mineral matter which is deposited by the solutions, which circulate along running continuously from a fissure which has one direction into a fissure which has another direction, so that from what were two fissures we have a final result after this action is completed a continuous quartz vein which having one direction in one part of its course turns

(Testimony of Fred Searles, Jr.)

around where the two fissures come together and runs off in the direction of the other fissure, and yet that quartz, that vein may be absolutely continuous in its structure because the accumulation and force which gives it this banding, and which gives the continuous vein which the miner can follow, swings right around in one of those fissures in the direction of one of them and runs off in the direction of the other.

Now, another attribute of these fissures formed by compression, by the release of stress in this manner, they are not planes of large movement, they do not have much motion between the walls. And the third attribute is that although the fissures themselves are the result of compressive stress, there cannot be great compression between walls of the fissures, that is, as though great stress in this direction produced a tendency to pull apart in this direction, so that those fissures could stand open even in places and [15] be avenues for ready circulation. I have attempted to discuss this consideration because I believe that is the history of the veins in Republic district and particularly of the veins in the Last Chance and Surprise and Lone Pine and Black Tail claims. [16]

Q. Mr. Searles, before you leave that diagram, the stress which compress the block of ground represented by the arrows and coming from the direction from which the arrows come.

A. That is correct.

Q. Go ahead.

(Testimony of Fred Searles, Jr.)

A. Before I leave the subject of the formation of the vein along two fissures by the swinging around of the quartz from one fissure into the other, I have here a photograph which was taken in a property immediately adjoining these under discussion which shows actually just that occurrence.

Q. Mark this.

(Photograph marked Plaintiff's Exhibit 7 for identification.)

A. I might say that we expect to have an enlargement of this photograph here by noon, and I would like to introduce the enlargement rather than this. This photograph was taken of the back of the drift, the camera being placed on the floor looking up, and this shows a quartz vein coming in from the left-hand side of the picture near the red letter "A" on the photograph, and the line of fissure of that vein which I can say extends along that drift for a good many feet is shown by the difference in color on the photograph, running off in the extension of the direction in which the vein enters the photograph. On the opposite end of the photograph near the letter "B" the vein is shown to depart in what would be the southeast corner of the picture and that vein runs along in its fissure for a long distance along that drift. So that we have in the center of this picture the intersection [17] of two fissures, one of those fissures continuous in its own direction, but the quartz vein which follows that fissure swings right around shown by the struc-

(Testimony of Fred Searles, Jr.)

tural lines within the quartz and takes up the direction of the other fissure.

Q. When you speak of the structural lines within the quartz, what are they?

A. The ore in these veins was deposited in bands. As one stands and looks at a face of the veins anywhere in the mine you can see a distinct banding of the quartz, little dark lines in it, and some alternate bands of calcite mixed in with the quartz so that it is not necessary to look at the walls of the vein in general to know in which direction it is running. Any miner would not have any difficulty in looking at the vein and seeing in which direction it goes. And it is that structural condition of the quartz which in part enables one to determine its strike or dip and its continuity along its course.

Now, the condition which is shown in this photograph is shown in very many places on these properties. The small stringers that exist throughout the country rock, there are hundreds of them in all the workings, very often turn around even through an angle of ninety degrees, coming around on one fissure and going off on the other fissure with absolutely no structural break in the banding of the material. So that we have in very many instances within the property in miniature just what we have in the main vein which runs through the property on a larger scale. The surface map of the Lone Pine adjoining property, Plaintiff's Exhibit 1, gives some idea of the analogy [18] between the structure in this area and that which

(Testimony of Fred Searles, Jr.)

I have just attempted to sketch as being the result of a compressive force acting on a block of homogeneous rock. We find that there are many minute fissures through this ground which have a general northeasterly course, and we have many others which have a northwesterly course. In this Lone Pine claim they are perhaps less numerous than the northeasterly ones, but they exist. And they exist also in the Black Tail and the other properties. By no means all of these small fissures and stringers and veinlets and small veins are shown on this map, for the reason that more than fifty per cent of the area under consideration is obscured by glacial drift. It is only in a portion of the property that the bedrock surface of the veins crops out so that it is open for inspection. And there is no reason to doubt that a great many more small veins and stringers exist on this property than are shown on the map. To emphasize the degree to which this filling of the country with small fissures exists, I will say that in the cross cut of the Pine one hundred which runs along the Pine claim in a general northerly direction there are more than forty-five small veins and stringers disclosed, and the aggregate number shown in all the workings is certainly several hundred. While there are very numerous small features of this kind, they are insignificant compared with two big veins which exist through this property. One of these veins we are not very much concerned with, called the Surprise vein, or the Surprise-Pearl vein, because it traverses both

(Testimony of Fred Searles, Jr.)

the Surprise and Pearl mining claims. That has a general northerly or slightly northwesterly [19] strike, and is a very strong persistent feature from which considerable quantities of good-grade ore have been removed. The other big vein is the Black Tail vein. That vein enters the area covered by this map in the Black Tail claim near the Discovery, and is distinctly traceable on the surface through the Black Tail claim, crossing its end-line against the Pine, through the Pine claim, curving around to the northeast and crossing the Lone Pine side-line and entering the Fraction claim. From there on to the northeast its outcrop is obscured by glacial drift so that I am unable to state exactly where it lies within the Last Chance Claim. These two veins are so much bigger and stronger than the hundreds of minute fissures that exist through that country that I think it would be fair to say that either one of them contains a great many more times more quartz and vein material than all the hundreds of little fissures which exist through the claim. They are the only two fissures in this property which have any commercial value.

Returning to the Black Tail vein, which is the one with which we are concerned, I would reiterate that that is traceable with absolute continuity, from the Black Tail through the Lone Pine into the Fraction claims, with the exceptions which I will now enumerate. There are a few small transverse post-mineral faults which interrupt the continuity of the vein, but all of these are visible mainly on the

(Testimony of Fred Searles, Jr.)

surface. Near the stope at a point not far from the discovery of the Black Tail claim, and are shown on this map by two blue lines, one through point 40–C and the other just south of the open stope. These are interruptions to the vein. [20] They displace it at a distance of twenty-five or thirty feet. But they are a very common feature to veins. There is, I believe, no doubt whatever that the segments on the two sides are the same vein, simply separated by this post mineral movement. North of the fault at 40–C the vein is clearly traceable on the surface continuously for a distance of 400 feet, having throughout that *a* distance a width of from four to eight feet of solid quartz and additional stringers. It is a good strong vein cropping continuously through that distance. Just northerly of the point marked T–875, where a small shaft or pit has been sunk a few feet on these croppings, the croppings run under an area of glacial drift. For a distance of perhaps one hundred fifty feet along the strike of the vein, and to the west down toward the corner of Lone Pine claim the ground is cumbered to a thickness of as much as fifteen feet with gravel, boulders and sand which do not permit anything to be seen of the features which are in the bed rock. So that we have in that interval from a point 14 feet northerly from T–875 to the end-line of the Lone Pine claim a gap of approximately 90 feet where there is no continuous exposure of that vein, and yet it is exposed again

(Testimony of Fred Searles, Jr.)

farther on, and the continuity which it exhibits in that direction is such that I believe there can be no reasonable doubt that it is persistent through that gap of ninety feet. At the end-line of the Long Pine a trench has been dug through this glacial drift which covers the surface of the ground, and in the bottom of that trench there was formerly exposed two streaks of quartz belonging to the Black Tail vein, one of which was about ten inches [21] thick and the other somewhat narrower. I might say that these exposures are not so good now, due to the fact that that trench was dug some time ago and has caved in to some extent, walled up, high walls in the glacial drift. From there for a distance of forty or fifty feet northerly the trench shown on the map does not go down to bed rock. It is right in the wash, although it is 5 or 6 feet deep. But when it does reach the bedrock again near Station T–843 it again exposes the Black Tail vein which is there 4 feet thick of solid banded quartz. From there down to 537, and for a distance of 20 feet—a distance of 15 feet northerly of it, there is a continuous exposure of the Black Tail vein at its apex in the trench. Throughout that distance it is a solid vein varying in width from 2½ to 4 feet. A few feet northerly of Station 537 this trench, coming down the slope, comes to the gulch which is clearly indicated running across the southerly end of the Pine claim by the contours which run around it. Here again we have a short distance here the sand and gravel and boulders

(Testimony of Fred Searles, Jr.)

carry down in that gulch by the water have obscured the outcrop of the vein, covered it over, so that it is not traceable at the surface, and there is in fact a length there of 42 feet in which no quartz can be seen, because it is covered over with gravel that has been washed out by the stream. [22]

A. (Continuing.) From that point the quartz is plainly visible on the northerly side of the ravine, and which there has a strike of north 52 degrees west pointing exactly over to the exposure in the northerly end of a trench facing it south of the gulch and forty-two feet away. The vein can be continuously traced without any break whatever except that there is a bush growing over the outcrop, making it for a distance of about eight feet south of Station 552 invisible. Up the hill across contours 2860, 2900 and 2920 continuously along that trench through the vicinity of Station 554, throughout that distance there is a small vein of quartz continuously exposed in that trench. Near Station 554 the quartz no longer exists. The main part of the vein no longer exists at the outcrop because it has been stoped out—mining operations have taken out the vein through the area marked "Open stope" and have removed the greater portion of the vein which is absolutely continuous from there across to the side-line of the Lone Pine Claim. In fact the red area between trench 897 and Station 545 and this Station 546 are only pillars left at the surface to help keep the stope from caving in. That distance from near

(Testimony of Fred Searles, Jr.)

Station 554 to the side-line of the Lone Pine Claim represents the outcrop of the ore shoot and that ore shoot has been stoped throughout that distance so that where except for the pillars, the vein no longer exists in the ground [23] the existence of the stopes shows that that vein was absolutely continuous throughout that distance. Now, there are certain features in this ground here beside the Black Tail and Surprise vein. I have referred collectively to a large number of northeasterly striking stringers, little veins, fissures, which are shown on this exhibit by the fine red lines, lying somewhere to the north of the main Black Tail vein. Three of these little stringers or little veins cross a trench at a point which is marked on this exhibit "Discovery cut by patent notice." As that cut originally existed, there were three stringers that could be seen crossing it. Recently a trench has been constructed across the old discovery trench so marked here and two of these stringers have been found to come together so that in the transverse trench there is shown a foot of quartz, and that crosses this trench which is marked "Discovery cut by patent notice." In both directions from that trench, trenches have been dug in the surface of the ground to increase or to help out the natural exposures in showing what becomes of these little stringers that exist in the ground through that region. One of these trenches has been dug through Station T 822, T–824, T–828 and so on across to T–831 at the easterly side-line of the Lone Pine claim.

(Testimony of Fred Searles, Jr.)

The COURT.—What is the scale of this map—fifty feet to the inch? [24]

A. 40 feet, sir. That trench does not follow continuous quartz. There are three places in the trench where the stringer which was followed along it has been left, going out in each instance on the northerly side of the trench, the trench crossing over through country rock and encountering other stringers which are followed for short distances, again going into the side of the trench and crossing over again to the 37 and so on so that there are three breaks in the continuity of the tracing of quartz to the east side-line of the claim. These breaks vary from five to I think as much as 8 or 10 feet. The trenches on the other side are rather more numerous. They have been dug at different times and they follow different stringers, but one of them passing through the points marked A, B, C, D, E, 596, 885, 803 to the west side of the claim follows several stringers so that by going along that trench, through that tracing, quartz may be followed continuously from the cut to the side-line. But a trench being dug that way could have been run in many other directions also following quartz, because these stringers branch and interlace so that it would be possible for instance to start at that point and follow other stringers off in other directions and arrive at a point one or two hundred feet —at least one hundred feet from the line in which the trench was actually constructed. [25]

Mr. COLBY.—Q. Where to?

(Testimony of Fred Searles, Jr.)

A. Most anywhere. These stringers are very numerous and they branch and interlace so that by properly following them one could vary the direction of his tracing through a considerable range.

The COURT.—Q. They are of no value, however.

A. They are of no value. They vary in width from a fraction of an inch to as much as a half foot and in some cases even more, but average only two or three or four inches—absolutely insignificant features as compared with the main vein.

Mr. GRAY.—Q. By whom was that trench dug?

A. I don't think I can give the chronological order of it. Different portions of it were dug at various times I have been at the camp. I understand the work was all done by the defendant company. But some of the trenches were dug and work discontinued for a long time and then others run.

Q. It was all done since this case started?

A. Yes, sir. There is one other feature which is now expressed by cuts at the surface of the ground. That is a vein which crosses the westerly side-line of the Lone Pine Claim near Station 572. That vein is exposed in trenches 840, 839, 836 and 901. The vein is also exposed further to the southwest in these trenches by the natural exposure and by a cut which exists across the Pearl end-line in this vicinity. That vein is last exposed in the floor of trench 901 which in its more northerly end is really a sort of incline tunnel [26] because at this end it has run under the wash, the same wash

(Testimony of Fred Searles, Jr.)

which obscures the outcrop of the main Lone Pine Black Tail vein a few feet easterly along the gulch. That last exposure of the quartz in that vein there at the north end of trench 901 is about 4 inches of quartz in the bottom of the trench covered to a thickness of about 8 feet of wash. There are other exposures of quartz rather massive exposures, which, however, seem to be of limited continuity along their strike at the northerly end of the claim, particularly in trench 834 and trench 835. Little quartz veins of substantial width, in one instance as much as 12 or 15 feet, are shown for a short interval. What becomes of them on their strike I do not know. Before all this trenching was done, there might readily have been suggested to the mind of a man who was walking over this area that the Black Tail vein which enters its southerly end-line continues northerly through the limits of the claim and crossed its northerly end-line; but with the development as it stands to-day there can be no question that the Black Tail vein crossing the southerly end-line swings around and crosses the side-line near Station 542, there entering the Fraction Claim.

Q. Right there, Mr. Searles, may I ask you what point in that side-line that vein crosses.

A. For the purpose of answering that question, I will refer to the composite map, Plaintiff's Exhibit 2. On this map there are shown a working called the side-line raise at Station 277. This working is the collar of a raise [27] which was put up

(Testimony of Fred Searles, Jr.)

from the 100 level of the Pine mine. It was put up to expose the conditions in the footwall of the Black Tail vein in this section. It does not follow the surface, the main Black Tail vein. The main Black Tail vein is exposed in that raise up to a point not shown on this map but marked in the ground and tied with a transit, and which we know as the point A. This point is in the footwall of the main vein within three feet of the side-line of the Lone Pine claim and within 6 feet of the surface. The reason for not carrying the working which exposes the vein at that point through to the surface is that conditions there are such that if an additional raise was put through, there would be great danger of caving that whole area. But that point is located within 6 feet of the surface. At that point the footwall of the vein and the vein itself has a strike of north 44 degrees east and dips 70 degrees. By projecting it on the strike for 3 feet and projecting it on its dip upward for 6 feet, the point may be determined with accuracy where the footwall of the main vein crosses this side-line. That calculation has been made and the distance as determined by that opening and by the calculation is 589 feet from corner two of the Lone Pine claim. Now the raise above and to the north of the point at which the footwall of the vein is exposed shows quartz. There are two or three stringers in it—two or three small veins, veins fully as big as the vein the discovery cut, according to the patent survey, and these veins are traced continuously to the

(Testimony of Fred Searles, Jr.)

surface at a point further along the side-line. I have in my notes a sketch of that raise.

Mr. GRAY.—We will offer it in evidence. [28]

(The sketch admitted in evidence without objection and marked Plaintiff's Exhibit 8.)

Q. Is sketch No. 8 the one you refer to?

A. This sketch is marked Plaintiff's Exhibit 8. That is a section of the side of that raise, looking northeasterly. It shows the main vein coming up through the back of the raise a few feet from the side-line and disappearing into the roof of the raise. There is also a small stringer diverging from the footwall here and following up for some distance in the raise. I might say that in my opinion this stringer or any one of the three stringers exposed in that raise is so small, so insignificant in comparison to the main vein which continues up to the surface that it ought not to be considered as being in the same class of structure or commercial importance as the Black Tail vein. They are, however, as big as the stringers in the discovery cut.

Q. The distance which you gave of 589 feet is the point where the main vein passes out of the east side-line of the Pine Claim?

A. That is correct.

Q. Before you leave that surface. Are any of the croppings of that Black Tail vein observable upon the surface to-day within the Pine claim?

A. Within the Pine Claim, the croppings of the Black Tail vein are observable continously with the one exception where it crosses the gulch and the

(Testimony of Fred Searles, Jr.)

places which are marked open, points where the vein has been removed by mining operations. [29] There is one point particularly where the vein itself this quartz and silicified rock have made a sort of bluff standing up plainly can be seen from across the gulch a long distance away.

Q. Can be seen across the gulch from what direction? A. From the Black Tail claim.

Q. Standing then from the Black Tail claim and looking across the gulch, you can observe the croppings, can you, of this Black Tail vein in the Pine claim? A. You can.

Q. Now you may proceed.

A. From this point 589 feet from corner two of the Lone Pine Claim, which is the point at which the footwall of the Black Tail vein crosses that east side-line, the vein is continuous into the stopes of the Last Chance mine. On Plaintiff's Exhibit 3 there is shown a section marked Section AA in the lower left-hand corner of the exhibit, which is drawn on a line, also shown as AA′ passing through this point 589 feet from corner two. In this section is depicted the vein as it would show if the ground south of that line AA′ were removed and one could stand and look at the clean-cut, vertical surface of a plane passed that line AA′. That tracing is beyond any question because the vein has been stoped through nearly all of the interval, the black lines showing on the exhibit representing the outline of the stopes, and in the interval in the stopes the vein

(Testimony of Fred Searles, Jr.)

exists as a strong, persistent fissure filled with quartz and calcite.

The COURT.—Q. What portion of that vein is indicated on the other map you had?

A. What portion of the vein? [30]

Q. Yes, as indicated on the surface of the map?

A. That is a section drawn through this point at which the line of the Black Tail vein crosses the east line of the Lone Pine claim in the direction of the end-line of the claim. I think it becomes a matter of interest to inquire as to the direction of the downward course along this section AA′ with reference to the strike of the vein in the Lone Pine claim. There is shown on this map Plaintiff's Exhibit 3, the number 2 or 200 foot level of the Pine mine and there is also shown a black line marked average course of the Black Tail vein in the Lone Pine claim, which is a line joining the exposures of the vein on this level where it crosses the east side-line and where it crosses the south end-line of the Lone Pine mine. There is also shown through one extremity of that line a line parallel to the end-line of the Lone Pine claim and marked here "Direction of extralateral right." The line marked "Average course of the Black Tail vein in Lone Pine claim" represents the average course because the vein being curved has many local strikes. Observations for strike taken at various points on the curve of the vein would give different results and the only result that can be had for its average course is a line showing the extremities of the exposure on the

(Testimony of Fred Searles, Jr.)

same horizontal plane within the claim. [31]

That being then the average course or strike of the vein within the Lone Pine Claim, a line drawn at right angles to it is the dip or direction of dip. The angle between the dip and the end-line or direction of extralateral rights of the Lone Pine Claim is 23 degrees.

There is also shown on this map, Plaintiff's Exhibit 3, the 500 level of the Last Chance and the 600 level; the 500 level being the longest level driven within the Last Chance Claim. There is shown immediately above that level a line marked "Average Course of Black Tail Vein in the Last Chance Claim," which is a line parallel with the exposure of that vein continuously from one end of that drift to the other. That drift represents as nearly as we may know the average strike of the vein within the Last Chance Claim and the line at right angles to it represents the dip. The direction of the end-line or the direction of extralateral right makes an angle with that direction of 37 degrees.

Q. So that whether you take the course of the vein in the Lone Pine claim or the course of the vein in the Last Chance claim between the planes of the end-line and one parallel thereto on the Pine claim, you are following more upon its downward than upon its onward course.

A. That is true; the direction of the extralateral right is more nearly on the dip of the vein than on its strike.

In reference to these sections A–A I will have

(Testimony of Fred Searles, Jr.)

that line placed on the composite map so that it will be at once evident as to the workings which that section cuts, but I will say that the vein is exposed almost continuously [32] by drifting on the line on that section, so I think there is no doubt whatever as to its continuity from the point which it crosses the side-line into the Last Chance stope and as far down as the 650, the deepest level of the Last Chance mine.

Now, the structural features exhibited by the underground workings on these properties are shown, I think correctly on the composite map, Plaintiff's Exhibit No. 2. I do not think it is necessary or desirable to discuss in detail all of the vein exposures and other structural features shown on these workings but I anticipate that there are certain areas where they become of particular interest and importance, and I have thought that one of such areas would be in the vicinity of the bend in the vein where the Black Tail vein entering with the northwest strike curves round and takes the northeast strike. One reason is that it is near that area where the gulch crosses the vein and there is a gap in which it is not exposed. For those reasons I have prepared a map of a portion of the 200 level of the Pine from its most southerly end to the beginning of the stroped ore body, showing the features that are exposed by that working in more detail than can be shown on a 40 scale map.

This map is marked Plaintiff's Exhibit No. 4 and entitled "A Detailed Sketch of a Portion of

(Testimony of Fred Searles, Jr.)

Pine No. 2 Tunnel," made on a scale of 10 feet to the inch. The original mouth of this tunnel was toward the lower left-hand corner of the map not far to the west of Station 340A. That tunnel ran through the country rock and was in the footwall of the vein. The ore chute which is mined for [33] some distance to the north and east exists through Stations 327 and 326 on this map; as is the case where most of the stopes are, one cannot see all of the vein because a great deal of it has been removed, but there is sufficient shown in the pillars in that vicinity to make it certain that throughout here was a vein having a width of 8 or 10 feet.

The COURT.—That is at an angle, you say, where the vein turns off.

A. That is at the point where the vein begins to swing around. Above this level this same swing may be seen in the stope itself where it comes up to the surface, standing at that open pit shown on the surface map near Station 544, but standing at the other end of that open stope the stope itself may be seen to swing around, so that even within the ore shoot where it is stoped an angular change in the strike of 20 degrees is plainly evidenced in that stope. And the quartz in the face of it has a strike of only a few degrees to the east of north instead of a strike north 45 east. The end of the stoping is along the line 544 and worked from there continuously to the northeast in the Last Chance ground.

(Testimony of Fred Searles, Jr.)

The COURT.—There is no work on the ground then southerly from that point?

A. There is quite a lot of work. The only stoping is over in the Black Tail claim in the vicinity of this Black Tail winze or shaft. From that ore body to the ore body in the Lone Pine Fraction claim there is no ore body of commercial ore developed.

The COURT.—It is now twelve o'clock; we will adjourn until two o'clock.

Thereupon an adjournment was taken until 2:00 P. M. of this day, Monday, August 23d. [34]

2 o'clock P. M. Monday, August 23, 1920.

Mr. GRAY.—Have you now the enlargement of the photograph which was presented as Plaintiff's Exhibit 7 this morning, Mr. Searles? A. I have.

Q. Will you let me have that marked, please?

(Photograph marked Plaintiff's Exhibit 7 for identification.)

A. This is an enlargement of the same photograph. The scale of this photograph, I neglected to state this morning, is given by the jack-knife which is inserted in the cleft of the rock. It shows more clearly than the small photograph the swing around of the banded quartz vein from the fissure running around in one direction to a fissure that makes an angle of about 90 degrees with it, the final result being a continuous quartz vein around that curve.

Q. The banding is observable there, which is

(Testimony of Fred Searles, Jr.)

shown in this enlarged photograph going around that curve.

A. Very clearly observable in the roof of the drift.

Q. Is such a condition common to this particular district and this particular mine, or is it one with which you are familiar in other districts?

A. It is a quite common phenomenon. One reason why I feel a degree of confidence in assuring the Court of the method of formation of this vein is that I have seen an entirely similar phenomenon in the formation of other veins in other camps. Particularly is this true in the gold quartz veins of Grass Valley in California, in which camp I was [35] brought up and worked as a boy in the mines. Those quartz veins, although they are in a camp which was, I believe, almost the cradle of our American extralateral right law, are not continuous planes. Many of the mines, and I think particularly of the Pennsylvania mine and of the North Star mine, with both of which I am quite familiar—in both of those mines the veins are formed in just this sort of way. They follow fissures for a distance until the fissure which they are following intersects another fissure, swing off onto the other fissure, leading off from the fissure which they were following, going on diverging from the side of the drift or from the back of the raise as a wall, but the quartz and valuable ore swinging on, on to a new course either in dip or strike. That is a phenomenon which is thoroughly recognized

(Testimony of Fred Searles, Jr.)

in that camp, and it is the result of the accommodation of a vein to a system of intersecting premineral walls. No one thinks there that when the vein swings over from one wall to another that it has faulted, or anything like that; it is simply a curve in the vein referable to just this sort of condition. Nor, of course, is a curve, even as much as 90 degrees in a vein, anything that is extraordinary. The biggest and most important gold vein in the United States—meaning the Goldfield Consolidated vein,—had two angles or curves in it greater than 90 degrees. I was very familiar with that vein.

Q. Does the miner or the geologist consider that those constitute separate veins in separate premineral fissures, or does he consider it as one continuous vein as long as he follows that banded quartz? [36]

A. The miner certainly considers it as one vein, because the quartz is the thing that he follows. The geologist might have different ideas as to the genesis of it, but I think the continuity of the quartz and the quartz structure is the thing that determines the identity and continuity of the veins, rather than a change in direction.

Q. Now, if you will just proceed, Mr. Searles; I think you were discussing the 10-foot map. And before you go any further could you indicate upon Exhibit No. 2, which is the area which is covered by this 10-foot detail map.

A. I will do so. The detail map, Plaintiff's Ex-

(Testimony of Fred Searles, Jr.)

hibit 4, is an enlargement of the portion of the second level of the Pine, which I will now include or embrace with a black line marked "S." It also shows one working on a different level, being the winze level, some 30 feet below the No. 2 level. It will be observed that this area covers the portion of the vein which swings around from the northeasterly to the northwesterly strike. As I started to say this morning, that vein is shown by the red color in the vicinity of Station 327 and 326, where it has been stoped and shipped as commercial ore. The end of the stope is in the vicinity of 326. There is a considerable interval to the south intervening between this stope and the next stope on the vein. The quartz is shown in red and the blue lines on the map indicate gouge fissures in the rock. One such is shown on the footwall on the vein at 327 passing along the foot to 326 and there diverging from the vein, and shown again crossing the crosscut immediately west of 328. It is also shown crossing very obliquely a tunnel farther south near its mouth. [37] Another fissure is seen in the little drift at 320B. Here a wall with the strike about N. 45° W. is indicated and a dip of about 70 to 75° in a vein which is shown throughout the extent of that drift a distance of about 12 feet. That is the only exposure of that vein that I know of. The main vein immediately south of 326 in part runs into the wall of the crosscut there. On the side of that wall may be seen a thickness of 6 feet of quartz running into the wall. Some of that

(Testimony of Fred Searles, Jr.)

quartz has died out by the time the vein reaches the crosscut west of 320A, for in that crosscut there is only about a foot and a half of quartz under a *gogue* wall. The interval in the drift for about 10 feet each side of Station 330 contains a relatively small amount of quartz, the major portion of the vein at that part being in the wall of the drift; but immediately south of 330—say 5 feet to the south to the main wall—the vein again enters the drift and is followed continuously a good thickness south through Station 331. At Station 331 the workmen ran into gravel. The interval just southeasterly of 331 is the interval immediately under the gulch and the gravel was deeper than was anticipated when this working was initiated; and in that interval, on the left-hand side of the drift gravel comes into the workings, but another branch of the drift has been extended down south from near Station 331, and that shows the vein continuing. It also shows a branching of the vein, for at that Station which I see no number on here but which I will mark 331½, a wall of the vein carrying a thin seam of *gogue* enters [38] the wall of the drift and continues in a southerly or slightly southwesterly direction. Behind that wall there is a little quartz, I should think at least a foot. But branching from that wall around curving to the right is—

Q. Curving which way?

A. Curving to the left—curving to the southeasterly, is a band of quartz also about a foot and a half wide which is followed for a distance of five

(Testimony of Fred Searles, Jr.)

or six feet in the wall of the drift. At that point a minute *gogue* seam breaks it and there is an interval right there near the first set of timbers in that working 6 inches long where that strand is broken and there is discontinuity at that extent at that point. I might explain that the red lines on the map shown on this southerly extension of the drift south from 331½, and in fact throughout the map, are plotted on that projection on the floor of the drift, because in a detail map of this kind a certain horizon has to be taken for showing the horizontal section. Of course, when one looks at the floor of the drift one does not see quartz—he sees track and dirt, and the point at which the quartz is observed is in the side of the drift; but it is projected to the floor because it is impossible to show it on the side on a plan map, so that the exposures which are indicated southerly from 331½ will not be seen on the floor of the drift as depicted, but will be seen on the side of the drift and projected on their dip to the floor. [39]

Q. Before you go on, this is the usual, ordinary method of mapping.

A. The customary method in all geological mapping?

Q. Go ahead.

A. From that little break of 6 inches the quartz is continuous in the drift immediately underneath the gravel or wash which overlies it, and that quartz there has a strike which I took with great care of north 28 degrees west. It will be seen that the drift does not have that course. The drift runs more

(Testimony of Fred Searles, Jr.)

southerly and therefore cuts diagonally through the quartz which looking at the side of the drift here is exposed higher and higher along the drift as one goes southerly, so that near the southerly end of the drift the major portion of that quartz is not exposed in the side any longer, but is exposed up in the back over the timbers, and in that back there is one strand of quartz which has a thickness of over 2 feet, and in fact in the set third from the end there is almost solid quartz for more than half the width of the back of the drift, fully three feet and a half, with some little stringers of silicified rock between them. The extreme face of the drift has been turned around to the right and exposes another band of quartz which is seen in the face itself coming in from the footwall side and crossing the drift. And at that point there is also a stringer having a width of about 3 inches which intersects the stringer which is crossing with a northwesterly strike. That stringer has a northeasterly or southwesterly strike, but has almost died out in the face of the drift. So that I would like to be very positive in stating that the vein exposure in the drift southerly of [40] 331½ has a direction a strike to the southeast, northwest and southeast, lining up and pointing toward the vein exposed at the head of the gulch winze. There is, however, quartz diverging from the drift with a southerly or slightly southwesterly strike at Station 331½. The appearance at that point is that of a branching in the vein, and while no vein structure is exposed diverging from this drift in the little irregular holes that are

(Testimony of Fred Searles, Jr.)

shown between the first and second set of timbers and in the face there is quartz and vein matter diverging from the drift at Station 331½.

The COURT.—Where did you say that is on the other map—on the brown map?

A. It would be at the point marked 331½ in black pencil.

Mr. GRAY.—Just about east of Station 552.

A. East of Station 552.

The COURT.—I do not ask counsel for the defense to disclose their defense any further than disclose by the pleadings, but how far are the parties apart and where is the direct issue between them?

Mr. COLBY.—The main issue, right in this area here.

The COURT.—If you will pass to the other map, I will understand the situation better.

Mr. COLBY.—This is a large, bold vein coming across here and the stopes and the large character of the vein and everything terminate along a plane generally that passes in this direction.

The COURT.—At about what point?

Mr. COLBY.—Along about where I hold my pencil —that line. It is shown on this composite map perhaps better, [41] because the stoping has taken place along like that. The stoping comes up to that point. Now, beyond that point is where we differ. There is a showing of quartz coming around on this fault in here which is broken up because of the many faults that go through it, and the great question is whether that vein turns and goes in this

(Testimony of Fred Searles, Jr.)

direction as the plaintiff contends, or whether it is the continuation of it across through these trenches here where this vein is exposed, ending toward this place Mr. Searles has just been talking about.

The COURT.—Yes. Now, where is that on the other map?

Mr. COLBY.—Right here. If your Honor notices these series of cuts here disclose a vein that has a trend in this direction. Now, you are coming down along here, if you can see, by these contours here, so that on this same level you would strike this vein in here somewhere and that level would continue right on, more in this direction.

The COURT.—I think I see what the point is now.

Mr. GRAY.—In other words, we claim that the vein turned.

Mr. COLBY.—Bent around at right angles, and we claim it goes on.

Mr. GRAY.—Or faulted.

Mr. COLBY.—It is faulted and goes on.

The COURT.—You may proceed.

A. I might in further response to your Honor's question, at this Station 331½ is the point that I will so mark on the composite map and the relation between the direction of the quartz departing from that point in the continuation of the direction to the vein to the north of that would head in a general way for the vein exposure in trenches 840, 839 and [42] 838, but that in detail the vein as exposed in those trenches heads not straight for that point but for a point right in the gulch. In other words, whereas

(Testimony of Fred Searles, Jr.)

the quartz in the face of that drift and in the face of the drift at the winze are headed directly for each other and distant and apart only 40 feet, the exposure of quartz departing from the side of that drift and the exposure of vein in the trenches are apart 100 feet and not headed directly toward each other.

Now, unfortunately we are unable to make a tracing of this vein continuously on this level any further in a southeasterly direction because the gravel of the gulch coming down across there has taken the vein away at that horizon, but another tunnel has been run a little farther south intersecting the vein on the other side of the gulch, and we have exposed in that tunnel at the winze marked Gulch winze and in the drift running to the northwest from it for a distance of 12 feet a vein of banded quartz having a thickness of from 2 to 4 feet, beautifully banded, containing gold and with a structure which is unmistakably pointed toward the other exposure in the face of drift south of 331½. Now, between those two points we are not entirely without some exposure of the vein. A winze was sunk near the Gulch winze which goes down on the dip of this Black Tail vein from this tunnel and some work was done down there drifting on the fissure and the vein in a northerly direction. That worked caved in and it has left an opening or hole in the bottom of the drift on the No. 2 tunnel level at Station 338, so that if you [43] do not mind taking the risk you can climb over the tracks there and get down into that

(Testimony of Fred Searles, Jr.)

hole and there is exposed in that hole at an elevation of 6 feet below the top of the drift a foot and a half of quartz which has a northwest strike and which projected up on its dip would line up for the continuation of this vein in its direction.

Q. Now, that showing at the cave opening is not projected up to the level of the drift which passes through Station 331, is it?

A. It is shown where it can be seen in the mine at a level 6 feet below.

Q. Projected upward to the level of that drift, where would it be?

A. It would be approximately in line with the strike of the vein going northwesterly from Station 340.

Q. Go ahead.

A. Also in the drift running southeasterly from Station 334 a small winze, a kind of a dog hole has been dug in the sand and gravel there for the purpose of exposing the bedrock underneath it, at an elevation slightly below this tunnel level. I had that work done myself because I thought that this quartz which lies immediately on this surface over here might be sufficiently resistant and hard so that it would protect the old surface and by sinking down to it there find some of that quartz lying right on top of it under the gravel and that proved to be the case. That winze was sunk 6 feet there, and I happened to be in it when I encountered the bedrock and lying immediately on top of that bedrock was just a scab of white quartz. Afterwards [44] a round was

(Testimony of Fred Searles, Jr.)

shot on that exposure of the rock there and that quartz proved to be just a scab lying on the surface, and the present face of the winze shows some quartz and some silicified country rock which underlay the first exposure of quartz which I saw there. That exposure which can be seen to-day is a vein 6 inches wide of quartz and some smaller stringers, which vein has a strike of north 18 degrees west. It is unquestionably, I think, a portion of the Black Tail vein which before this erosion took place continued across between the Gulch winze and the southerly end of the drift.

Q. Where did that lie, on the foot or hanging wall?

A. The winze was sunk vertically through the sand and going down that winze there was exposed a smooth surface, an erosional surface created by the sand washing down the gulch and that quartz lay right on top, formed the surface in part, and the present exposure in the winze is the result of having shot one hole or two holes to further show up that material.

Q. Is the quartz in that sand winze shown in the exact position that it is disclosed there or is it projected to the level of those drifts?

A. It is shown where it is disclosed at the level about six feet below the tunnel.

Q. Projected upward to the level of the drifts, where would it be?

A. Projected upward on its dip it would be some 5 or 6 feet southwesterly of its position in line with

(Testimony of Fred Searles, Jr.)

the Black Tail vein. So that with those exposures only the longest gap in the tracing at approximately this level of this Black [45] Tail vein across the gulch is the distance between those two winzes, both of which expose portions of the vein, and that distance is 18 feet.

Q. Is there any doubt in your mind that the vein is continuous through there, Mr. Searles?

A. I think there is no question whatsoever. Now, I might say that an attempt has been made to disclose this vein across that interval without any interruption by sinking to a level below the gulch and the winze was accordingly sunk at a point marked Gulch winze going down on the dip of the vein for a distance of about 30 feet. That winze follows the vein to the bottom, but the quartz in that winze pinches out immediately below the floor of the drift and from there down to the bottom of the winze there is practically no quartz observable. We have the walls, a hanging wall which exists overlying that drift, continues down, and the fissure is there, and attrition products but there is no quartz in that winze. A drift was run from the bottom of that winze northerly through Station 349 and for a distance North of that which I don't know. At the present time that drift is open only where shown immediately North from Station 349. Beyond that it is caved in. [46] After it caved a hanging-wall lateral was run through Station 350 around in the wall of the rock and at the point marked with a little cross hatch another attempt was made to cross into

(Testimony of Fred Searles, Jr.)

the fissure, which there is very heavy ground. That apparently caved in, too. All you can see there now is the caved material running out into the end of the crosscut. In that material is a lot of sand and gravel.

Q. Well, now, is that surface sand and gravel?

A. That is sand and gravel out of this gulch. And that is exposed again in the very face of this work, the most northerly face and I will say that I don't think I have ever seen just a similar condition, a fissure going down forty feet below the surface of the ground containing sand and gravel carried in by that gulch. Now, there is only one explanation for it, and that is that this vein which we have here, and which has been followed down the winze throughout that interval, consisted largely of soft material, just as it does in the winze, gouge and crushed rock, and the stream coming down here has been able, with the boulders and sand which it carried, to wash out of that fissure a good deal of the attrition products which it carried, and the result has been that a pothole has been formed there right along the face of the fissure. Now, I don't know the limits of that pothole,—whether the limits of that pothole which has been filled with sand and gravel are exactly the walls of the vein, because I have never been into it to see, but I am confident that the line of it as shown by this sign for gravel along here is approximately the trace of [47] that vein before it was literally gouged out of there by the action of water working into the soft material. I think it is a very unusual

(Testimony of Fred Searles, Jr.)

cituation. But the vein continues across there and by sinking still further and getting underneath that sand finally it could be developed across that interval. There isn't any question about it. So much for that.

Q. Just one place you have not discussed. Did you describe what is shown in the working that passes through Station 334?

A. For a distance southeasterly from Station 331 there is country rock exposed on the hanging-wall side. That is to say on the northeast side of that drift, so that for some distance along there the appearance, at Station 334 for instance, is of a wall, on the northeast of which is country rock and south of which is gravel. So that we have there a place where the fissure is marked in part by gravel which has filled it. Just how far that country rock proceeds along there I do not know, because it is closely timbered up and for a distance between these two winzes it has caved in, and you cannot get in there at all. There is another interval in which this Black Tail vein is not thoroughly developed. I mentioned that this morning. And it lies at the southerly end of the Lone Pine claim. As stated this morning, from the collar of that winze at the surface or gulch winze I referred to, the Black Tail vein is traceable southerly up the trench through T–843 as a plain, strong vein two and a half to four feet wide of banded quartz. That is traced continuously [48] in that trench up to a little dotten line showing the entrance of what is here described as the end-line

(Testimony of Fred Searles, Jr.)

tunnel. From that point it is no longer observable, or was no longer observable before that tunnel was run at the surface, because the trench above that did not go through the wash. The wash and glacial material was so deep there that it would be difficult to dig a trench deep enough to show the bedrock. And there was up to the time this tunnel was run an interval between that place and the end-line in which the croppings of the vein were not exposed. And that interval immediately joining an interval between the shaft T–882 and the end-line where, as I mentioned this morning, the glacial drift is very deep on that end of the Black Tail claim. So a tunnel was run to try to show that condition where it crossed the line, and that tunnel exists as a deep surface cut at its mouth, and the vein is traceable through that cut for a distance along this strike of 35 feet as a plain, strong vein. At that point, which is 25 feet northerly from the end of the line the vein is faulted. There is another little transverse fault just like those that displace the vein near the open stope further down on the Black Tail claim which cuts that vein and displaces it. And there is an interval in the tunnel there where no quartz is exposed. That interval is very short, five or six feet, and then quartz comes in again on the westerly or foot wall side of the drift quartz to a thickness of eight or nine inches and possibly [49] ten inches, banded. And the tunnel as driven is not exactly on the strike of that quartz. The tunnel was driven on contract, I guess, and hurriedly, and it

(Testimony of Fred Searles, Jr.)

ran through that vein, and the vein is exposed in part, diverging into the hanging-wall side within a few feet of the end-line. Then a round was shot in the roof or back of the drift at that point so that right at the end-line the face of that tunnel is eight or nine feet high. Further around was shot also on the footwall side. And the purpose of that was to show up all of the vein which existed at that point, and the result has been to show at that point an unusually weak condition of the Black Tail vein. It exists in that particular section as a number of small stringers, none of them more than three inches thick, most of them less than an inch thick.

The COURT.—Right down towards the southern extremity? [50]

A. Right at the end-line. Not near the southern extremity of the Black Tail vein, however.

The COURT.—Q. I meant the southern extremity of that claim.

A. Of this claim; yes, sir. I do not believe that the entire thickness of the Black Tail vein is shown in the section at the face of this tunnel for the reason that, as may be seen by a rather careful examination of this map, that tunnel lies five feet easterly of Trench T–842, in which quartz is exposed at the surface underneath the wash crossing the end-line, and that quartz being approximately at the same elevation as that tunnel would still lie in the footwall side of it. So that I think one reason for the rather weak appearance of the vein there is that not all of it is exposed at the tunnel.

(Testimony of Fred Searles, Jr.)

There is probably some more underneath. The exposure which does exist there is a number of small stringers. There were seven exposed originally and additional work exposed four or five more, so there is about a dozen or thirteen small stringers of quartz through silicified country rock. Also in the tunnel at a lower elevation on the same level as the Pine No. 2 level in drifting southerly in that we find it weakening to a considerable extent. That is indicated in this 10-foot detail. That vein in the vicinity of Station 340 is fully 4 feet thick, but at the last station exposed on this level, near Station 342 it is only 10 inches thick, and beyond that point the vein is not exposed at all in the tunnel. [51] The tunnel has been run in one wall or other of the vein. What probably has happened there is that the vein which is seen at Station 342 as a thin quartz vein, ten inches thick, diverging into the wall of the drift, is cut off by the fault indicated by the blue line 17 feet southerly from 342 and is probably displaced across the drift by one of these faults so that I think the end of this drift is in the hanging-wall of the vein and the vein lies out here. It has never been developed. I am not sure about it; but I am sure that somewhere in this immediate vicinity there is a strong vein across that end-line because at that same level approximately and southerly from it from the end-line, only 150 feet *feet,* that vein is developed in the Black Tail tunnel and it is there a strong, important vein.

(Testimony of Fred Searles, Jr.)

Q. Before you proceed, you spoke of these two little faults. Do you identify that vein on the two sides of that fault? A. I do.

Q. It is the same vein?

A. I think there is no question about it with the exception I am not certain that the entire vein is exposed in that surface of the tunnel.

Q. What is the fact with reference to veins, gold veins, quartz veins, with which you are familiar weakening in places and being strong in other places; having ore in one place and not commercial ore in another?

A. Well, of course, it is a well-known fact and recognized by miners as well as by geologists that the tenor of the content of veins of any sort of metal is not constant throughout the length of the vein; they have lean places and rich places [52] and some veins have good proportions of ore in them and other veins have small proportions of ore in them. The veins at Republic, at least in this vicinity are rather lean; the percentage of stopable ground is not very great.

Q. You may proceed.

A. I took a photograph of the exposure of the Black Tail vein in the edge of the drift immediately north of Station 2318 in the Black Tail Tunnel level just to show what the vein looked like in that area. I have that photograph here.

Mr. GRAY.—Mark it Exhibit nine.

(Photograph admitted in evidence without objection and marked Plaintiff's Exhibit 9.)

(Testimony of Fred Searles, Jr.)

A. That is a picture of the face of that drift immediately north of 2318 as though you were looking at the face of the drift. The small pick there gives the scale of it and one can see the approximate width of the quartz, together with the fact that the quartz does not all lie in one strand, but there are horses, small horses of country rock between them. That country rock looks black, but it is almost as much quartz as the white quartz, because it has been almost entirely practically silicified. There are also small stringers in the rock underneath the vein which can be seen by the photograph. The vein there is fully 3½ or 4 feet thick. I might say that the reason for not taking this photograph at Station 231, which was a little closer to the end-line, is that there the vein runs diagonally through the drift, or rather the drift runs diagonally through the vein. So that the exposure on this side is a diagonal section of it, instead of a section like [53] that in the face of the drift. I don't think it is necessary to discuss in detail the structure of the other parts of the mine. I do not know of any reason for doing so. I have examined the structure as indicated on this map and can subscribe to it generally.

Q. May I ask you whether or not you found a vein which you have called the Black Tail vein passing into the south end-line of the Pine claim or the Lone Pine claim and which passes for some distance on its strike through that claim, departing through the east side-line?

(Testimony of Fred Searles, Jr.)

A. That is a fact, and with the exceptions noted, I have traced it and can trace that except in the places where it is covered up; it is absolutely continuous structure and can be traced as indicated in the question.

Q. And dipping beneath the surface of the Last Chance claim?

A. It does dip beneath the surface of the Last Chance.

Q. May I direct your attention specifically to one point, and that is on the No. 2 level. Do you find the banding and the quartz changing its strike from northeast to northwest on the No. 2 Tunnel level?

A. I do; that is the condition.

Mr. GRAY.—That is all.

Cross-examination.

(By Mr. COLBY.)

Q. Mr. Searles, you spoke about the formation of fractures in rocks resulting from compressive stresses, and that these fractures often formed at a wide angle, that is an angle [54] approaching 45 degrees, as I understand you.

A. I did not intend to convey that impression.

Q. Is that not a fact, that in homogenous rock the angle of fracture is generally 45 degrees?

A. The angle between the two systems of fracturing?

Q. Yes. A. I do not think so.

Q. You don't think that as a result of scientific tests on homogenous rock that they get fractures

(Testimony of Fred Searles, Jr.)

which are at right angles to each other as a result of compressive stress?

A. Fractures which are at right angles to each other? You said 45 degrees.

Q. I meant ninety degrees. That was my mistake.

A. Yes. That angle varies according to several things. Work on that subject has been carried out to some extent by Daubrea.

Q. Leith has done something on it also, hasn't he? A. Yes.

Q. Knowing that is true, would you not ordinarily expect to find veins that are formed along fractures that are the result of compressive stress turning at right angles?

A. Well, that is not true, because as shown in this photograph, we do not ordinarily under these conditions have a vein coming up to a sharp point and then turning off at an angle. You have rather the vein curving around in the vicinity of the line at which these two fissures come together, and then more generally taking up the direction of the other fissure.

Q. Is that true of the Grass Valley veins that you were speaking about? [55]

A. We have in the Grass Valley some angles that are very sharp and some that are a good deal more oblique.

Q. Referring to these Grass Valley veins and particularly to the Pennsylvania that you cited as an example that had some marks of resemblance

(Testimony of Fred Searles, Jr.)

at least to the situation that you found here, does not that Pennsylvania vein continue as a general vein striking with a general strike throughout the country?

A. To the best of my recollection, there are numerous places in the Pennsylvania Mine, notably in some of the ore shoots, where the vein is continuous in one direction for as much as four or five hundred feet, and then down to the intersection of another wall, and in that mine the intersection is not at an angle of 90 degrees; it is somewhat more oblique. The vein turns off on that wall and persists for a long distance, perhaps as great, and then turns back in course more nearly approaching that which it had at first; so that by taking points at great distances apart, one can get an average strike on the vein, as one can on any crooked vein.

Q. In other words, that vein does not turn as a whole at right angles, but keeps on its general course zigzagging as it goes?

A. A distance of 1000 feet might be had on that vein which would show a very substantial angle approaching a right angle, between two directions on the vein, but if one takes the vein from one end to the other it cannot be said that half of it is in one direction and half of it in another continuously as is more nearly the case here.

Q. Now, isn't it a fact, Mr. Searles, that when these fractures are formed by compressive stress and cross each other that you find that fractures

(Testimony of Fred Searles, Jr.)

continue on beyond the points of [56] intersection in both directions?

A. Not ordinarily in both directions; more commonly in one direction. I would not say they never crossed each other.

Q. Don't you frequently find an extension of the fracture beyond the point where it crosses the other fracture and comes up to the other fracture?

A. You infrequently find it. It is much more frequent to find the reverse, one of the fractures stops at the other.

Q. Now, we have in this country, I believe you have testified to the Surprise vein, and in order that the Court may keep this in mind, we have an extension of the Surprise vein at 201. That is true, is it not? A. Yes, sir.

Q. And then again at 192, 193, 194, 195 and so on?

A. Referring to Plaintiff's Exhibit 2; yes, sir.

Q. That vein extends through that country in that general direction, that is a little northwest and southeast, isn't it? The map is oriented, in other words, so that the side-lines of the map are due north?

A. The vertical border of the map is north.

Q. So that the Surprise vein has a general course through the country of northwest and southeast?

A. Yes. That is the predominant direction of fissures in the Republic Camp.

Q. About how many feet can that vein be traced to your knowledge?

(Testimony of Fred Searles, Jr.)

A. I have traced it 2,000 feet, I should think.

Q. And it passes right off parallel for a distance to the Black Tail vein and continues on beyond this right angle [57] turn that is taken by the Black Tail according to your idea, on its strike?

A. I don't subscribe to the right angle turn in the Black Tail vein.

Q. That is immaterial, whatever angle you give it. It is very nearly a right angle.

A. The Surprise vein throughout the length where it is developed in the Pearl and Surprise mine has a course which is persistent throughout.

Q. And it did not surprise you of course, that that Black Tail vein coming in the same direction, should not be persistent or the Black Tail vein should not keep on parallel to the Surprise?

A. You ask me if it surprised me?

Q. It surprised you to find a right angle turn in the Black Tail instead of its keeping in a general parallel course to the Surprise?

A. I think I may say it did. I think I may say in following it for a long distance in this northwesterly course—for instance, if I had been locating its extension, I would have located it onward in that direction.

The COURT.—How far are these two veins apart?

A. They are not exactly parallel but in the vicinity of the Black Tail tunnel are 320 feet apart.

Q. And how far apart would that be, assuming that the Black Tail crosses into the Lone Pine in

(Testimony of Fred Searles, Jr.)

the vicinity of the gulch winze that is projected to the Surprise, through which you would expect to find it if it continues on its course? [58]

A. The Black Tail and Surprise veins in the section of the gulch winze are about 160 feet apart.

Q. Now, this photograph that you have taken and the enlargement of which has been introduced as well as the original, came from what mine?

A. Came from the San Poil mine which adjoins, lies somewhere to the west of this property.

Q. And some considerable distance away across Eureka Gulch?

A. Yes, 2,000 feet, I should think.

Q. Did you get any photograph like that in the ground in dispute here?

A. I didn't get any photographs, but I have a number of sketches of the identical thing such as that. I took a photograph of that because of course, it isn't often that you find an exposure which is just right to photograph, but the absolutely identical situation is shown in very numerous places in the Lone Pine claim where these little veinlets curve round from one course to another.

Q. Isn't it quite common for veins to undulate and turn so that you can get a photograph of that sort in a vein that is not turning at all on its general site; in other words, can't you in many mines find a local curve of that sort where the main vein keeps on straight?

A. Many veins have local curves in them but you will see in this particular vein no limit of it.

(Testimony of Fred Searles, Jr.)

Q. How much of the vein is included in that photograph?

A. I should say roughly by this scale, not to exceed 5 feet. [59]

Q. You know we have here various levels, 1, 2, 3, 4, 5 and 6. And I suppose the vein as shown on these levels within the Lone Pine claim, according to your theory, turns on each of these levels and extends into the Black Tail country?

A. I think the vein can be developed around the turn on any level, yes.

Q. That has not been done though.

A. That has not been done.

Q. And as a miner came up, mining on his ore, he stops at this termination?

A. He stops when he reaches the limits of his ore.

Q. So that you haven't any exposure or any turns in the ends of this discovery which correspond with this photograph which you have taken in the San Poil mine?

A. I have an exposure which corresponds to that photograph in the sense that there are turns exposed in these levels. For instance on 3 level, in Crosscut 343, there are two quartz veins one of which is about 14 inches thick and the other a little thicker which have a northwest and southeast course and which come right around into the Black Tail vein and the structure of that quartz swings right around that angle.

Q. What is the strike of that turn at 325?

(Testimony of Fred Searles, Jr.)

A. The strike of this is given by the direction of the drift and is—the strike of the vein for the distance expressed in 3431 is east and west.

Q. How many degrees does that differ from the general strike of the Black Tail vein?

A. About 40 degrees.

Q. In order that the Court may understand, the strike [60] of this turn that you say is another turn of the Black Tail vein runs off in another direction— A. I didn't say that.

Q. Excuse me, isn't that the Black Tail continuously in there? A. That is a branch of it.

Q. Isn't that the strike of that particular portion—you say that is a branch of the Black Tail?

A. Yes.

Q. How does that compare with the Black Tail itself, the general strike?

A. It follows it, about 20 degrees.

Q. About half a right angle? A. Yes.

Q. If you will take the strike also of this little vein in here that shows just to the east of point 127 and give me the strike of that.

A. There are several veins there.

Q. This one turns off approximately at right angles. A. Right angles to what?

Q. The main drift.

A. There is a vein on the second level—on the first level of the Pine near Station 243 which has a course of north 20 degrees west.

Q. And the main vein, what you call the Black Tail, passes right on to the southwest of that vein,

(Testimony of Fred Searles, Jr.)

doesn't turn and follow the course of that vein to the southeast?

A. No, but that branch vein can be seen both in the drift and in the stope on that vein to swing around most beautifully from this course of northwest around into the main Black Tail vein so that if one lies on the footwall [61] of the stope right up where these two veins come together you can extend one arm in the direction of this branch and one arm in the direction of the main vein and the quartz comes right around that turn and swings in and becomes parallel with the quartz structure of the main vein. It is quite an astonishing bend there.

Q. What do the miners call that vein here that is labeled 100, 200, 300, 400, 500 and 600 foot level?

A. I haven't the slightest idea.

Q. You haven't asked them or heard them say anything about it?

A. I don't think I have ever talked about it to the miners.

Q. Have you read any of the literature on the subject?

A. I have read some reports dealing with this area, yes, sir.

Q. Have you seen any maps, any old maps, say prior to 3 or 4 years ago with the vein labeled on maps?

A. I have seen some old maps but I don't remember about the labeling.

Q. Have you read any reports of this vein, that

(Testimony of Fred Searles, Jr.)

are more than 2 or 3 years old?

A. I have already stated that I have read some literature.

Q. I don't mean published reports. A. No.

Q. Let me understand you. You have never heard this big vein, leaving out this small portion that you have tried to carry across the end-line, you have never heard that called the Lone Pine No. 2 vein?

A. I have never heard any portion of that vein called the Lone Pine No. 2 vein but I have seen it so described in [62] print.

Q. Have you ever seen it described as the Black Tail vein, that portion of it?

A. Have I ever seen it described?

Q. Yes.

A. I have seen it on the ground as a portion of the Black Tail.

Q. That is not what I asked of you.

A. I don't know what you mean.

Mr. GRAY.—I think I shall object to that. I don't think that what someone else may have called it, particularly the manager of their mine, has anything to do with it.

Mr. COLBY.—The point I wish to bring out is the fact that this vein here exposed at this point and in this working was christened the Black Tail vein for the purpose of this litigation. Prior to any thought of this litigation—

The COURT.—There is nothing in a name. You can call it whatever you please.

(Testimony of Fred Searles, Jr.)

Mr. COLBY.—We are governed to a great extent by what practical miners think of these matters. Their opinions have greater weight even than what experts think of it.

The COURT.—Who christened it, a practical miner or somebody else?

Mr. COLBY.—What I want to bring out from this witness is the fact that he has called this the Black Tail all through without ever giving any intimation it was ever called anything else.

Mr. GRAY.—If you wish to call it something else I have no objection.

The COURT.—He is basing his conclusion upon his own [63] examination and not upon names or anything of that kind. I will sustain the objection.

A. I was never in this camp, Mr. Colby, until this litigation was started.

Mr. COLBY.—The fact answers for itself, as far as reports and miners are concerned. They call it something else.

Q. Now, I would like to have you point out Mr. Searles, on this composite map where to the south, beyond this right angle turn, there has been any stoping done inside of the Lone Pine.

A. There has been none inside of the Lone Pine claim.

Q. I would also like to have you point out to the Court and so that we can get it into the record the work that has been driven since this litigation was

(Testimony of Fred Searles, Jr.)

started and which we will refer to generally as litigation work.

A. I don't think I can do that, Mr. Colby. I don't know entirely. I can point out certain workings.

Q. Certain work was done under your direction, wasn't there? A. Yes.

Q. Point that out.

A. I directed that the hole called the Sand winze be sunk, and I gave general directions that the work be done to trace the Black Tail vein across the on a lower gulch or a little level so that it could be followed continuously; and possibly also general directions that are responsible for the Gulch winze having been sunk, although I as a matter of fact didn't give any instructions to sink the winze in this way.

Q. The winze level is also a part of that work, isn't it? [64]

A. It is a part of that work; yes. I think that last year I remember discussing—I think I also suggested that a drift on the 300 level be driven through the hanging-wall of the Black Tail vein for some distance toward the end-line of the Lone Pine claim, without any relation to the structure of the rock at the particular point where it was driven, and I think that that was responsible for the working shown as 332 having been constructed. I am not certain about that, but I believe that to be true.

Q. This working labeled "End-line Tunnel" was

(Testimony of Fred Searles, Jr.)

also done under your direction, wasn't it?

A. No, sir.

Q. It was done after you became connected with the case and was done for the purpose of litigation?

A. I don't know what the purpose of it was. I presume it was done to show the point at which the Black Tail vein crosses the south end-line. I didn't have anything to do with it.

Q. Was that for the purpose of mining ore?

A. No, sir. I did, though, direct some work in connection with this examination which led to the discovery of a very considerable ore body, but not on this vein; in the Surprise vein. [65]

Q. I don't doubt your ability to find ore, if ore is around. I am interested with Mr. Searles in a mine that has developed quite a little ore, so I have had practical experience which leads me to believe that he is a practical miner in that respect when there is any ore around.

A. Thank you.

Q. Now, you stated something about there being transverse post mineral faults over on the Black Tail claim that followed the Black Tail vein, as I understood it. A. Yes, sir.

Q. What is the dip and strike of those faults? Take first the fault that passes between points 212 and 213.

A. That fault strikes north 35 degrees east and dips 40 degrees to the southeast and consists only of a gouge. There is no quartz along with it.

Q. Take the fault that passes point 232.

(Testimony of Fred Searles, Jr.)

A. That is a crooked fault. Its average strike within the area developed is north 32 degrees east, and its dip varies from 75 degrees to practically vertical. It is not parallel in dip with the other.

Q. 75 which way?

A. 75 degrees to the southeast.

Q. Now, are there any other postmineral faults in this area that are conspicuous that you know of?

A. The biggest postmineral fault in this area is a fault right along the Surprise-Pearl vein. That is, of course, the strike of the—

Q. That accompanies the vein and produces considerable gouge? [66]

A. Brecciated quartz breaks it all up.

Q. Is there not some faulting along this Black Tail vein that you notice?

A. Little slips, like this wall, for instance. In many places in the mine there are little slips on one wall or the other which show evidence of postmineral movement in the vein to break up the quartz.

Q. I will confine my question to the Black Tail vein within the Black Tail ground.

A. Yes, there is a little gouge in the footwall near Station 231.

Q. Do you find it in other places along the vein in the Black Tail claim going south? I see some blue lines marked along the foot of the Black Tail passing 231B. What is that intended to represent?

A. That is intended to represent gouge.

Q. Do you find gouge in any other places to the

(Testimony of Fred Searles, Jr.)

southeast following along the Black Tail, any pronounced gouge, indicating a faulting or movement along the Black Tail?

A. I don't remember any. My notes show the veins as if there were not much of a gouge there.

Q. Do you find any postmineral faulting over in the Lone Pine claim? A. On the Black Tail?

Q. No, on any of the veins, crossing any of them in any direction, any pronounced faults?

A. There are some small faults. I testified to one in the end-line tunnel, and to two in the upper 2 level near Station 348. [67]

Q. Do you find any as you get over towards the Pine 200 level?

A. The last ones I mentioned were in the Pine 200 level.

Q. The tunnel portion of the level coming in straight? A. In the adit?

Q. Yes.

A. There are some gouges there, but I don't know that there are faults of any considerable displacement. The trouble is this is a homogeneous rock, and you have nothing to measure displacement by.

Q. Now, as we come south along the Black Tail vein you introduced a photograph here of the face of that little drift to the north of 231D?

A. Yes, sir.

Q. You picked the vein up again, as I understand, near the point 231—passing through the point 231 on the other portion of that level? A. Yes, sir.

Q. What was the appearance of that vein at the

(Testimony of Fred Searles, Jr.)

farthest point north you could find it in that level?

A. There is gouge on the footwall of the vein and it runs into the side of the drift, the whole vein does diagonally, so that you do not have a square section cut across it. But it is a good strong vein, having quite a thickness of quartz on it. I will try to refresh my memory as to the exact thickness.

Q. Sort of caved there, isn't it?

A. Sloughed in; yes.

Q. Sloughed in from the side of the roof? I would like to see your notes on that particular point. [68]

A. It shows a good strong vein dipping to the northeast about 40 degrees. I have a note there. There is another vein also shown on this map running out of the drift which runs nearly due east from Station 231, and that comes into the main Black Tail vein right at Station 231, and I have a note there that the relation of these veins to the bottom of the drift is obscured by a muck pile.

Q. It would be a comparatively easy matter to develop that vein going across north from that end line?

A. It would be a comparatively easy matter. It would be a matter of some expense. You would have to clean out the level and put in track and air-pipes and a compressor and so on, but it could be done.

Q. You don't think that vein has pinched out right in the side of that drift going northerly?

A. No, I am absolutely confident that it has not.

(Testimony of Fred Searles, Jr.)

Q. Now, we come up on the surface, the last point where you found the outcrop of that vein is in what dip?

A. It is 12 or 13 feet northerly from the pit T–882. There it runs underneath the wash.

Q. Taking into consideration the slope and configuration of that hill, you expect to find the outcrop of that Black Tail vein lying up with your end-line tunnel, passing through your end-line tunnel?

A. Yes.

Q. Which way would the apex of that vein be thrown? You call that migration, don't you?

A. Yes.

Q. Where an apex is thrown out of its normal or technical strike by being followed down a steep slope, along a steep slope—I say which way would that have been thrown as you pass down this slope, taking into consideration its normal migration? [69]

A. The outcrop or apex would migrate to the east from the strike because the vein is running very slightly down hill, the migration would be very small, but it would be almost in continuation of the line of the apex, because it has been continuously running downhill.

Q. Now, let me understand you, you say it has been continuously running downhill. Take it from point 40C to this point where you say it is last exposed, T875, is that running downhill?

A. 28 feet; yes, sir.

Q. It is running down 28 feet in that distance?

(Testimony of Fred Searles, Jr.)

A. Yes, sir.

Q. What is the length of that distance?

A. 380 feet.

Q. You have a 20-foot drop in 180 feet?

A. 380 feet.

Q. 380 feet. A 20-foot drop in 380 feet. So you would call that, wouldn't you, comparatively level?

A. It is level compared with some things, certainly.

Q. It is level compared with everything from T–875 down to T–842, isn't it?

A. That is a steeper course downhill; yes, sir.

Q. As you say, the migration would be to the east, if it was a normal migration, is that not true?

A. The migration all the way would be slightly to the east from the strike and if the vein were absolutely straight the migration for a geometrical plane would be more in that portion than in the other portion.

Q. As a matter of fact, you have the apex shown turning to the west? A. Yes, sir. [70]

Q. Where do you find the bend?

A. I have never seen the bend in that interval.

Q. In following its normal course, as you say its normal migration would be to the east, wouldn't you expect to find that apex to the east then?

A. I would, if there were no bend in the vein.

Q. Where is the bend that you saw?

A. I say there is a bend in the vein because I know where the vein crosses over here.

Q. I mean you jump at the conclusion then that

(Testimony of Fred Searles, Jr.)

those two are the same in spite of the fact—

A. I certainly am of that opinion, whether I jump at it or arrive at it.

Q. It is immaterial how you reach it, but in spite of the fact that the normal migration of that apex would take you the other way—

A. I quite agree with you that there must be a slight turn in the vein there to account for the direction of that line.

Q. And the only evidence you have of the turn is your desire—or, I won't say your desire, but your idea is that it crosses the end-line at that particular point in the end-line trench?

A. That is true. The vein is not absolutely straight anywhere. A very slight deflection of that kind is nothing to be wondered at.

Q. Now, as we come a little further northerly here, if you will measure that jump for me between the two exposures with your scale where it is last seen to the end-line and [71] trench?

A. There is 85 feet in which the outcrop of that vein is covered up with the wash.

Q. Taking this end-line trench found at T–842, what do you find there?

A. We have a deep trench dug in the glacial drift, lagged up with boards, up the side, and stulls across it to keep it from caving in altogether, and the lower part of that trench is not down to bedrock. The upper part of it shows bedrock, and at the present time there is exposed right where this trench from T–843 comes into it, that trench however, not

(Testimony of Fred Searles, Jr.)

being down to bedrock, within 6 or 7 feet, but right in line with that there is an exposure of quartz in the bottom of the trench. Now, I saw that trench once before, a year ago about, there was more quartz to be seen there than there is now.

Q. Do you think that is in place?

A. Do I think that quartz is in place?

Q. Yes, sir.

A. No, possibly that is not in place, in the sense that it is loose, but I don't think it is movable.

Q. You do find large quartz boulders, though, immediately above on the hill, don't you?

A. Large quartz boulders?

Q. Yes, sir.

A. I happen to remember a big boulder of white granite up there. Possibly you have mistaken that.

Q. No. A. I don't remember it.

Mr. GRAY.—Boulder of what?

A. There is a large white granite boulder in the wash [72] above that. I don't remember any large quartz boulders. There may be some.

Mr. COLBY.—Don't you find large quartz boulders on that hillside generally in float, and rather large ones?

A. There is a good deal of float particularly in this place; there is some quartz laying around on the surface.

Q. What strike did you get as the strike of that exposure in T–842?

A. All I can say is it ran substantially across the trench about the direction of the vein.

(Testimony of Fred Searles, Jr.)

Q. Wasn't it exposed so you could get it?

A. No, it was a very poor exposure there.

Q. This broad red band that you have crossing the end-line trench and extending to a certain extent across the cut goes to that T–843, what is that?

A. That is intended to be a projection from the end-line tunnel of the stringer condition of veins, If you will notice that carefully, it is a collection of red lines.

Q. You generally put those in broken effects, don't you, when you project?

A. Well, this is a projection of four or five feet.

Q. You have what you consider what an exposure of the Black Tail vein in the tunnel immediately below. Can you give me your notes on that?

Mr. GRAY.—Suppose you take the judge in your confidence on that and lay them up there where you can see them.

A. I am sorry to say this is rather a poor map of that area. The vein coming up this trench is faulted there first about 2 feet, and then continues along the part of the tunnel which is still open and just along there I have not [73] its width, but I have a good recollection of it as being at least 2 feet thick until right about where the tunnel arches overhead, this is goes underground entirely, there is a smooth wall crossing the tunnel and the quartz ends against that, and then in that tunnel for a distance there is no quartz to be seen. The roof of the tunnel is wash after passing along that for a short distance. I have measured that, so I know what that is. It is

(Testimony of Fred Searles, Jr.)

14 feet. There is a band of quartz comes in at that side of the drift.

Mr. GRAY.—Which side?

A. On the southerly side of the drift. I have a strike on that of north 55 degrees east, a dip of 50 degrees, 8 inches to 10 inches of banded quartz. That was at the floor of the drift. Since this map was made there has been one round shot in the drift right here where that quartz enters the southerly side and the quartz is shown going in there and there is also a wall shown on one side of that little hole. Further, there has been a round shot at the face right at the end-line into the foot-wall and additional quartz is exposed there, but it is quartz which crosses the drift and which is a fairly massive band there, 8 or 10 inches thick, as it goes up on the dip, goes out like that—

The COURT.—I would understand this a whole lot better if I saw the map of it.

Mr. COLBY.—He is referring right now to this portion right here, the vein coming in underneath this.

Q. The point that I want to get at is, isn't it a fact that there is not that amount of quartz indicated there on this Exhibit No. 2 showing in the end of that tunnel that goes underground. [74]

A. Yes, I testified this morning there are 12 or 13 stringers of quartz there.

Q. What are their strike and depth?

A. The strike and dip is about north 50 degrees east, and dip 50 degrees.

(Testimony of Fred Searles, Jr.)

Q. Does that correspond with the general strike of the vein, the Black Tail vein?

A. I should say north 50 degrees west.

Q. North 50 degrees west?

A. Yes, sir; it does correspond.

Q. And that exposure that you see right in the face of that tunnel, you testify dips and strikes in the same direction as the main Black Tail vein?

A. Yes, sir, a majority of the quartz. There is one stringer in the face of that hole, now that you speak of it, I remember, which is transverse of the rest of them.

Q. Isn't it a fact that the only thing that you have got in the end of that tunnel that corresponds to the line of that Black Tail vein is a gouge seam running through there, a gouge showing there and no quartz?

A. Certainly it is not a fact.

Q. You looked at that the last morning just before you left, didn't you?

A. Yes, sir. I might have a piece of one of those quartz stringers.

The COURT.—The Court will take a recess for 5 or 10 minutes, Gentlemen.

(Thereupon a recess was taken.)

The WITNESS.—Replying further to that question I will say that I hold in my hand here, marked "B" for identification the widest, biggest piece of quartz I could pick [75] out of that face, that is to say, that thickness is the widest stringer that showed in that face, and the majority of those stringers are narrower than that, I counted, I am un-

(Testimony of Fred Searles, Jr.)

certain, whether 12 or 13 which have a strike substantially parallel to the Blacktail vein, and this other piece marked "C" for identification shows something of the character of the rock which in part exists in that vein between the stringers, and that rock has really nearly as much quartz as the white quartz, the original structure of the rock has been obliterated, it has been replaced by metasomatic action until it is practically silica also—the character of the material in part between these stringers that exist in that face —some of the material in the face, though, is not nearly as much silicified or altered as these. I am frank to say that this is the biggest piece of quartz that I could find there. Most of the stringers are much smaller.

Mr. GRAY.—Let those "B" and "C" be our Exhibits No. 10.

Mr. COLBY.—Q. Will you designate just where those were taken?

A. They were taken from the last round that was fired in the face of that end-line tunnel. The round had been shot from the footwall side. I am very willing to state, Mr. Colby, that that is a weak showing for the Blacktail vein. I think that there is probably some more quartz on one side or the other of that drift. It seems very incredible to me that as big and strong a veing as we have here at Station 231 should be as weak as that at that tunnel, although it is a satisfactory showing of vein. [76]

Q. Now, referring again to this turn to the East of point 343, where you say a branch of the Black Tail

(Testimony of Fred Searles, Jr.)

vein goes off on that level, where do you find the name "Black Tail vein" beyond and to the south of 343?

A. The condition obtaining there is that the strand of quartz shown on the southerly side of that level is very flat, so that in the drift between Station 343 and 344, that quartz extends in that drift diagonally up across the side of the drift practically to Station 344, because it is flat. But other than that and a very small stringer in the face, there is no quartz in that drift. There is, however, quartz diverging into the westerly side of the drift right underneath the raise, and I think there is a portion of the vein which extends over there, and further sections drawn through the gulch winze here would indicate that the main portion of the Black Tail vein should lie beyond the face, that is, south of the face at Station 344. And I have very little doubt that a portion of the vein extends on the third level somewhere across through here.

Q. How long would it have taken you to drift from the end of that level to Station 344, or that vicinity, to where you hit the vein?

A. Oh, a very short distance. I will try and do it yet, if you wish to have it done.

Q. Not unless both sides agree to additional work and the court does not object. We do not want to delay the case, of course. When did that level reach the point 344?

A. I don't know. It was between the first time I saw the mine and my last visit to it some time in that year. [77]

(Testimony of Fred Searles, Jr.)

Q. In other words, it has been several months that that has been standing in that condition and as you say, it would take only a few days to reach your main vein by crosscutting to the west?

A. As far as I know. I think the vein could be developed on this side of the turn or very near, on those levels, but I am uncertain just where it is, and it might be quite a job to do all of that development, and worth all the mine is worth.

Q. Now, coming to this little stub of work, coming out from No. 2 level, from the point 331½, which you have marked in pencil, isn't it a fact that the strongest showing is on the right hand side as you come in quartz, along that side, rather than the branch that you speak of going along to the left?

A. Well, the entire exposure of quartz in that drift, except at that end, is on the right side of the drift as you come in. The left-hand side of the drift is a wash.

Q. As a matter of fact, isn't that quartz turning in to the right or to the west as you go into that little drift?

A. As a matter of fact, the quartz showing in the last 20 feet of that drift certainly is not. It there has very plainly the strike, the northwest strike of the southerly and main portion of the Black Tail vein. But as I stated on Direct, there is a branch of the vein right at Station 331½ entering the wall of the drift. I was rather surprised that some work was not done to follow it out there.

Q. Aren't there planes in that quartz that keep

(Testimony of Fred Searles, Jr.)

turning off to the right as you go into the drift towards the end?

A. You mean right at Station 331½?

Q. Beyond that. [78]

A. No, sir, there are not. The structure of that quartz is very plainly striking to the southeast.

Q. The quartz is really brecciated, isn't it, broken up?

A. It is broken, lies right on the surface.

Q. That was the original surface, wasn't it? I mean that was an outcrop of the vein before the wash covered it? Or, to put it in another way, if the wash were taken away, it would outcrop at that point?

A. Yes.

Q. And it would be very natural to find it discolored and broken and seamed and easily removed?

A. That is true.

Q. Now, coming over to Station 320 on the No. 2 level, right at this point, there is a little stub turning to the north or northwest? A. Yes, sir.

Q. What is the showing in that stub of vein condition, if any?

A. There is a small vein drifted on for that distance into that stub. That is shown in detail and in its proper proportion to the Black Tail vein on Plaintiff's Exhibit 4, at Station 320–B. It consists of a streak of gouge about an inch to two inches thick, on a plainly defined wall, which runs as shown by the blue line at 320–D, and overlying that a band of quartz, which from 323 to the face of that drift is parallel to that gouge and lies on it as a wall.

(Testimony of Fred Searles, Jr.)

Q. How wide is it?

A. The quartz is one foot wide at the face and averages about a foot between the face and 320–B. Right at the face there is additional quartz on the northerly side of that drift.

Q. That has a strike that corresponds substantially with [79] strikes on these segments of veins that you found between 331, we will say, and 348?

A. I don't know exactly what you refer to by segments of veins between those.

Q. You haven't got a continuous vein between those stations, have you?

A. It certainly is a continuous vein.

Q. I mean you haven't a continuous exposure of the vein? A. No, sir.

Q. But as far as those segments which are exposed are concerned and their strikes are concerned, this correlates with it, doesn't it, substantially?

A. It is substantially parallel with it. It is along the direction of the northwest conjugate fissuring.

Q. Do you know of a little winze in that stub drift?

A. I think there may be a winze there. At least there is a hole full of water. I don't know how deep it is.

Q. That is not shown on this map? That winze, I mean, the indication of a winze? A. No.

Q. In other words, when you indicate a winze, you make an indication here of gulch winze, a sort of a crossmarking in black, but that is not indicated here, nor is it indicated on any of your maps as far as I can see, is it?

(Testimony of Fred Searles, Jr.)

A. I don't know of its being indicated on any map. I had forgotten all about it until you mentioned it. There is a hole there full of water.

Q. Did you make any inquiries as to what is shown there or desire to have it cleaned out? [80]

A. No, sir.

Q. You don't think it has any bearing on the case?

A. None whatever that I know of.

Q. Now, coming over here on your Exhibit 2, just to the east of letter "L," Pearl No. 2 tunnel, I see a marking there that would indicate a vein crossing that tunnel. What do your notes show as to the dip and strike of that?

A. At a point in that tunnel 12 feet outside, that is toward the mouth of Station 321, there is a gouged wall that has a strike of north 48 to 50 degrees west and a dip that is rather crooked, of from 55 to 70 degrees. That is exposed in that crosscut. That is the adit itself, I think, also is shown in the face of the little stub drift that ran southwesterly from Station 322.

Q. That just merely shows an indication in the face? A. Yes.

Q. (Continuing.) That you might have reached the wall of that vein?

A. That is right. I think it is probably called a vein. It is chiefly gouged, but there is a little quartz in it.

Q. That corresponds in general strike and dip with some of these other exposures down here in the

(Testimony of Fred Searles, Jr.)

southern end of the Lone Pine which you correlate with your Black Tail vein?

A. That has the northwest strike of about half of these fissures. That is to say, most of the veins in this ground run either in a northeasterly direction or northwesterly direction and are parallel or sub-parallel; that is, parallel to the northwest.

Q. Now, coming for a moment to the exposures in these [81] trenches here, T–840, 839, 838, and T–901, will you give me in a general way the width of quartz that you find in those trenches?

A. In T–840, there is a substantial quartz vein 3½ feet thick, not all of it white quartz; some of it silicified rock.

Q. That is the width of the vein, is it?

A. Yes, sir. In trench 839, there is 3 to 3½ feet of quartz and silicified rock and above this, that is to say southwesterly of it, there is country rock. It shows some stringers clear to the upper end of the trench.

Q. If you took that all in, how wide would that make the formation?

A. That trench is about 15 feet long, I should think. That trench 838 has silicified rock and quartz to a total width of 6 feet and a strong appearing vein. In trench 901, at the southerly end of the trench, there is 4 feet of quartz. That diminishes rapidly in thickness.

Q. Not because it pinches out?

A. It does not pinch out.

Q. It disappears in the walls?

(Testimony of Fred Searles, Jr.)

A. No, the entire thickness is exposed on the floor of that trench just before you go down into the hole where it is 14 inches thick. Then there is a short distance where you enter the hole, where the quartz is back of the trenches as shown in the Black line, and there was an interval there where the quartz is not exposed. I think it is in the right hand side of the trench, but it is near the bottom part of the trench. That is, in bedrock. The upper part is in wash. And there [82] is an interval there of 5 or 6 feet.

Q. There may be quartz under the wash that you did not see, or were not able to see.

A. I think there is quartz under that. The strike is indicated by a line drawn through those trenches.

The COURT.—That is a general northeasterly direction?

A. Yes, sir. It is on the surface map.

Q. I don't care so much about having it on this one. Would it be possible for you to put that exposure on your 10-foot detail map in pencil? I don't want to destroy the picturesque character of any of these exhibits, but have you any objection, Mr. Gray?

Mr. GRAY.—Not if you would like to have it done. Do anything you want to, Mr. Colby.

Mr. COLBY.—I don't want to take the time of the Court now in doing that.

A. I would be glad to do it, Mr. Colby, but my impression is that the map is not big enough to take them all in.

Q. It would take in part of the trenches. As far as you can, I mean.

(Testimony of Fred Searles, Jr.)

A. You see that gap across the wash there is about 100 feet.

Q. Let us measure it.

A. Mr. GRAY.—Mr. Colby, why don't you have one of your engineers take a tracing of that, and he can put that on.

Q. We can measure from the mouth of that tunnel here, how far is that? A. Eighty-six feet.

Q. Now, measure on Exhibit 4. [83]

A. All right.

Q. That is the distance to the side-line?

A. I will have to plat the side-line on here.

Q. I wish you would do that and color in red here.

Mr. GRAY.—If it was not shown on any of the maps, I would not object to it, but it is shown here.

Mr. COLBY.—You do not show it in its proper relation. You have it on a surface map here where the main strike of your vein is some 60 feet or so above, so it does not show in its proper relation. Produce your proper relation on this 10-foot detail map, because those would be practically on the same level, wouldn't they, those exposures, what you call the Black Tail vein up here and the upper portion of that detailed sketch, Exhibit No. 4, and the elevation of these trenches? It would be practically on the same level, wouldn't it?

A. I am a little confused about what you say. But if I understand you correctly, you inquire whether the trenches T–838, 839 and 840 are about the same level as No. 2 Pine.

Q. Yes.

(Testimony of Fred Searles, Jr.)

A. If that is the inquiry, they are.

Q. So that the relation between the coloring that you might place through those trenches, to this color in the upper portion of the map which is intended to indicate what you call the Black Tail vein, would be in their relative positions, as you place it on here, on the same level. That is the point I am getting at.

A. If I put these trenches on a 10-foot scale map and show the vein across them, you will have in these trenches an [84] exposure of the vein on about the same level as the No. 2 Pine, is that your inquiry?

Q. That is it. A. That is correct.

Q. That is why I wish that put on, if you will do that.

A. Would you like to have me do that now?

Q. No.

Mr. GRAY.—Mr. Colby, why don't you have one of your engineers do that work? He can do it just as well as Mr. Searles.

Mr. COLBY.—Our engineers might not agree with them.

Mr. GRAY.—But we have it on the other map. All they have to do is to transfer it and enlarge the scale.

Mr. COLBY.—I would like Mr. Searles to do it, unless you have some particular objection.

Mr. GRAY.—If he wants to do the work, all right.

Mr. COLBY.—All he has to do is to trace it in pencil and to color the vein exposure as he finds it on that level, in those trenches, in red, so that it will correspond with the rest of the exhibit, in red pencil.

(Testimony of Fred Searles, Jr.)

A. I will be glad to do it.

Q. Now, when we come to this Exhibit 1, that you have here, I notice that the red color that you represent the apex of the Black Tail vein with, as it crosses to the southwest from the easterly side-line, comes along through the claim on a straight course until it reaches a point near Station 544, and then suddenly it turns and curves to the south at a considerable angle from its former course to a point, we will [85] say, where it crosses contour line 2880. Is that a real curve in that vein, or is it an apparent curve due to migration of apex?

A. It has an element of both. The strike of the vein begins to bend around, as I stated this morning, within the ore body itself, so that in standing on the hill at the easterly edge of the opening marked "Open stope" and looking down into that stope one can see the stope and the vein which is left in its walls turning around in strike, and that turn within the limits of that stope is 20 degrees as taken with a compass. Beyond the limits of that stope there is a further turn of the vein itself, and its structure and its walls, but there is also an effect due to the migration of the apex on the hillside which accentuates that turn, so that the red line here indicating the apex of the Black Tail vein and the apex itself on the surface are of course, not in the same position as they would be if that apex was on a flat surface.

Q. Now, to bring that out a little further, your Pine 100 level is just below contour 2900—would come just below that wouldn't it? A. Yes.

(Testimony of Fred Sc

Q. It would be right at contour 2900. So that if you took a horizontal section through what we call the Black Tail vein, at that 2900 level, you would get a strike substantially as is shown on Exhibit 2 as representing your vein, which you call the Black Tail, running along the 100 level, wouldn't you?

A. Read that.

Q, (Last question read.)

A. You could trace on that 100 plane, similar to that— [86]

Q. What we call an engineer's or true strike— the technical as distinguished from the miner's strike taken on the surface?

A. Yes, it would be the intersection on that plane, and a true strike would be found by taking the points furtherest exposed.

Q. In other words, you get the true strike of that vein on that level, and there is no such turning as is apparent, I mean, or would appear to take place, on your surface map as an actual fact in the real strike of the vein, is there? A. There is, yes.

Q. I say there is none to that extent as it would appear to be made by the vein from your surface map? In other words, what is the difference in direction, the angle of course, between this portion of the vein between 554 and 544 as measured against the distance between 544 and 552? What is the angle there?

A. The angle included within the two lines which you mentioned is approximately 40 degrees. If I understand you correctly, you wish to indicate that

(Testimony of Fred Searles, Jr.)

on a horizontal plane, the curve would not be the same as that shown on the surface, which is a hillside?

Q. Yes.

A. That is, of course, perfectly true. However, the total result is the same, because whether the vein crop is on the hillside or any other surface, when it finally gets around to this strike, it has this strike, and the only difference is the curve in the line between the two courses which it finally occupied.

Q. The point I wish to bring out is on this 100-foot [87] level between these points, you would not have the same turning which appears on this surface, because you haven't the migration, isn't that true?

A. You would have the same final result, but you would not have it accomplished through a line which would take the same course exactly that this line does on the surface map.

Q. In other words, you can have a vein, which is a sheet of material, cutting into a hillside like this, and coming along level from the east side-line, out to the point where it takes this apparent turn on Plaintiff's Exhibit 1, and migrates down the hill, and yet, you would not necessarily have any change in real strike, and the change in direction would be, as far as the vein is concerned, aparent only as far as strike is concerned.

A. You can have a vein cropping on the hillside and have a curve in the apex or outcrop of that vein without any curve in the strike of the vein, but you could not have a straight vein, that is a vein

(Testimony of Fred Searles, Jr.)

that was a mathematical plane, intersect this particular hillside, and get the particular curve that the apex of this vein shows without a curve in the strike of the vein.

Q. There is, as you say, a slight change in the direction. You call it 20 degrees.

A. There is a change of 20 degrees within that stope, and there is an additional change in the strike of the vein going down to the point that you mentioned.

Q. You don't think that any of that is accounted for by migration?

A. I know certainly that some of it is. [88]

Q. Now, coming over to the discovery cut on the Lone Pine, that is marked here "Discovery Cut by Patent Notes." Let me see your note that you have taken of the exposures at that point. You have not colored the veins in red or the quartz exposures as you come to the west from the discovery cut?

A. No.

Q. What was the width of the quartz that you found in the discovery cut itself?

A. To the best of my recollection there is now exposed 12 inches.

Q. Is that all of the vein, or is there more vein material than the actual width of the quartz?

A. There are two other stringers that cross the crosscut.

Q. At different points, and they may not be included in that 12 inches?

A. No, sir.

(Testimony of Fred Searles, Jr.)

Q. Now, as you come to the west from the discovery trench, we will say about 10 feet, what width of quartz do you get at that point?

A. I have no note on the distance of ten feet, but the vein continues with substantially that width until at a distance of about 20 feet it is considerably wider; 2 feet and a half, I think, at one point.

Q. Isn't there a place there where it is 5½ feet wide?

A. I think it is not. I certainly did not see such an exposure myself. [89]

Q. Did you gather from the quartz that you found on the north, the fartherest quartz on the north, any details regarding 5½ feet of solid quartz?

A. Not solid quartz. Where some of these stringers come together, you can get 10 or 12 feet, perhaps.

Q. That may be true, but do you call those stringers when they obtain that width?

A. I call them veins. I think that those showings up there are perhaps of sufficient importance, some at least, to be designated by the name of veins.

Q. Haven't you seen hundreds of discovery veins that are not as strong as that showing that is there?

Mr. GRAY.—I don't see that that is very material, but I won't object. [90]

Q. Haven't you seen many discovery veins where the showing is not nearly as strong as that discovery cut in this immediate vicinity?

A. In the immediate vicinity to what?

Q. Of the discovery cut.

A. You mean have I seen this in the immediate vicinity of Republic?

(Testimony of Fred Searles, Jr.)

Q. No.

A. I have known many discovery cuts that did not have as much showing in as that one.

Q. Of vein material? A. Of vein material.

Q. Now, as I understand you, when you traced that showing of quartz down to the east side-line there were three gaps there which according to your idea we jumped from one stringer of quartz, one exposure to another. In what general direction were all of these exposures of quartz running longitudinally, what was their general direction?

A. Strike northwest.

Q. Substantially parallel? A. Yes.

Q. You found no cross veins through there?

A. Yes a great many.

Q. Where are they indicated here?

A. You mean in that immediate vicinity down there? A. Yes.

A. I don't know as I know of any in that immediate vicinity. Yes there are some. For instance in trench 828 there is a vein running to this northwest and southeast strike shown for a distance of 20 feet in that trench. Of course [91] the principal part of these trenches are run to develop veins running this way, but I think it would be possible to develop veins in the other direction.

Q. Don't you think it would be possible to run in continuous quartz even if we had failed in the short time we had to run that trench—

Mr. GRAY.—In the short time?

Mr. COLBY.—In the short time we were running this particular trench.

(Testimony of Fred Searles, Jr.)

Mr. GRAY.—You got that permission from his Honor before last Christmas.

Mr. COLBY.—I think you are mistaken on that. We stipulated on that.

Mr. GRAY.—All right we stipulated before last Christmas.

Mr. COLBY.—As far as running these particular trenches, we asked you about a month ago and it was only recently we got the permission. Now, I don't want to criticize the opposite side because they have been very courteous. Sometimes the permission came a little late and this time we were crowded so it was impossible to complete all the work we wanted to do satisfactorily. I don't want to complain because Mr. Gray has been very generous to allow us to do this work when we got down to it. Sometimes it took a long time to get down to it, largely I suppose because we were largely separated; but as a matter of fact when we got started on this work we had to short a time to complete it.

Q. Don't you think, with your ability—and I mean it when I say "Ability"—that you can follow continuous quartz [92] from this discovery quartz from this cut to the side-line?

A. I can hardly answer otherwise than yes in view of that question; I think I can and if I might strain your opinion as to that ability a little further, I think that if the end was worth while that I could do more; I could follow continuous quartz from that discovery cut over to this vein and perhaps clear out to this other end-line.

(Testimony of Fred Searles, Jr.)

Q. Now, if that is the case, let's take your No. 2 exhibit and the No. 1 tunnel showing it. Where do you have your cross-veins on there that you can follow from your discovery cut down to what you call the Black Tail vein.

A. That No. 1 tunnel is a crosscut in a northeasterly direction.

Q. Northwesterly?

A. Northwesterly directiou. Of course, therefore, it intersects the northeast stringers. But if a crosscut were run this way it might easily intersect—for instance, Black Tail tunnel running through here develops nothing but northeast stringers. The crosscut running in this direction develops the other system.

Q. As a matter of fact, these recently exposed stringers that come down in this direction so that you can connect up the discovery cut with this so-called Black Tail vein?

A. There don't happen to be any continuous stringers, at least in that direction within that limit, but there are numerous ones on the side-line there.

Q. Are they of the same substantial size as the stringers which you have been referring to or the vein which runs from the discovery cut? [93]

A. They are substantially the same size but not of the same frequency. In this particular area these stringers in this direction, little veins in this direction, are much more numerous than those running this way.

Q. Is that the general structure of the country at

(Testimony of Fred Searles, Jr.)

right angles to the side lines of the claim?

A. The general structure of the country, as I attempted to point out this morning, is in two directions, due to the method of it having been stressed.

Q. Coming a little further along on this map—it don't show I believe on the surface map—but do you know what is commonly referred to as the No. 4 vein?

A. No, sir.

Q. Your nomenclature is a little different from mine so I will have to describe it by referring to Exhibit 2. What do you call this vein which is shown running through Stations 148, 149 and 150?

A. There are at least two veins there and I do not know of any name for any one of them.

Q. What do you call the vein which runs through 281 and 282—you haven't any station to the west of that particular cross working?

A. To the best of my recollection there is more than one vein shown in that working, but I do not know of any name for any one of them.

Q. Is there any stoping in that vicinity?

A. There is a stope on one of those levels, a small stope over the working called the Pearl winze.

Q. Is that the only stope that you saw in that vicinity? A. Yes, that is the only stope. [94]

Q. You don't know of any stopes than that one of the Pearl winze? A. That continues along?

Q. How long does that continue? How long is that stope?

A. My recollection is that the limit of it to the northwest is a raise.

(Testimony of Fred Searles, Jr.)

Q. Northeast?

A. Northeast is a raise which is said at least to go to the surface. I presume it is a continuation of what is called the north shaft, so that the full length of the stope there would be about 85 feet.

Q. Do you know anything about its vertical dimension?

A. Goes up as far as I can see, that is in the vicinity of the raise.

Q. You would call that a pretty substantial vein, wouldn't you?

A. It is 2 feet of banded ore at the edge of the stope, 2½ feet wide at another place, but the stope is really put up partially on the intersection of 2 veins, this vein lying about 28 feet northerly of Station 148 and the vein which runs through Station 148, and both of these come into the stope near the raise that I have previously mentioned.

Q. The general strike of that vein is parallel to the general strike of your Black Tail vein from or near the part that is south of the right angle turn?

A. I don't know of any right angle turn.

Q. I am not trying to lead you of course into any admission or anything of that sort.

A. Yes, sir. The two veins are substantially parallel.

Q. Also substantially parallel to the two veins shown in [95] the discovery cut?

A. That is true. [96]

Q. Now, coming along a little further on the surface map, you have a couple of veins here marked as

(Testimony of Fred Searles, Jr.)

running northwest and southeast, one in a trench with a pit at the end of it, marked "T" 834?

A. Yes, sir.

Q. Do you think that is the correct direction for that exposure—I assume that must be quartz there.

A. I think it is.

Q. And where does that show in this trench marked T–835?

A. There is nothing other than a stringer that lines up for it at all. If continued in that direction, it is presumably faulted. If I might explain further, it looks in a general way at the surface there as though that vein there in the trench T–834 is the same as the vein in the trench T–835, and such may be the case, but a close examination of the directions of the vein, right at the end of the little shaft, at the end of trench T–834, shows it is running northwesterly. Now, that may turn around there, as the Blacktail vein does run out this way. You cannot tell what is going to happen in this country, that is fractured in both directions. Or it may be faulted in there. I am sure I do not know.

Q. What vein is this shown in your north shaft crossing it?

A. That, I presume, is the same vein that shows in this little stope that we were just talking about on the Pearl No. 2 tunnel level. I say I presume so, [97] because that raise which goes up from that level connects, I believe, with the north shaft and comes out the surface, so if the vein is followed continuously that is the same vein.

(Testimony of Fred Searles, Jr.)

Q. Is there a vein shown at the surface crossing that north shaft?

A. There is a vein shown there parallel with the plates.

Q. What is the size of that vein?

A. It is a substantial vein, as I recollect it there, 3 feet wide.

Q. Now, coming to another point, I believe on one of the exhibits here you gave the dip of this portion of the Blacktail vein, as you understood it to be, connecting the extreme portions where the vein has turned, and crossing the side-line and end-line, to give its average strike. Suppose we eliminate this southwestern portion of your vein beyond where you consider it makes a turn, what is the average strike of the remaining portion as represented by those levels there, 100, 200, 300, 400, 500, and 600?

A. If you will give me the general line—

Q. An average strike?

A. That strike on that vein—

Q. Take it for 300 feet on each side of your side-line.

Mr. GRAY.—Of which side-line, Mr. Colby?

Mr. COLBY.—The east side-line. There would [98] only be one because according to your idea it crosses the end-line.

Mr. GRAY.—I do not object to your getting it, if you want to. I do not think it is—

Mr. COLBY.—The point I want to bring out, of course you can make any kind of a strike, you can take that vein and connect up portions from here to

(Testimony of Fred Searles, Jr.)

here, and it has got nothing to do with the strike as it crosses the side-line, but what I want to know is the average strike of the vein as it crosses that side-line.

Mr. GRAY.—Don't you think you should confine it to the Lone Pine claim itself, that being the claim that is asserting these rights.

The COURT.—The side-line is a part of the claim.

Mr. GRAY.—Yes, but to the vein within the claim.

Mr. COLBY.—As it crosses it, take it for 300 feet, we will say, so as to limit you, coming in this direction.

Mr. GRAY.—From the side-line.

The COURT.—What is the general strike?

A. The general strike at the side-line is about north 44° west.

Mr. COLBY.—Q. North 44?

A. North 44° east. I do not know why I get these mixed up.

The COURT.—It is about the same on both sides.

A. Yes, sir. It is shown by this working [99] these workings. There is no great diversions.

Mr. COLBY.—Q. And what would its dip be?

A. The strike I gave you was the strike that I exactly observed at the point where it crosses the side-lines, and its dip would be at right angles to that, of course.

Q. In other words, then, if you place a rule at right angles to these various levels here, it would in a general way give you the dip of that vein as it crosses the side-line. Place your ruler in that

(Testimony of Fred Searles, Jr.)

position as I hold it now, at right angles to the strike, and that would give you the dip, wouldn't it?

A. Yes, except that I don't know how accurately that is placed. It is approximately.

Q. I am not trying to fudge or mislead you into anything.

A. Of course I am certain of that Mr. Colby, but I mean it is a question of calculation.

Q. I want to see these conditions because we ordinarily have a model here, a skeleton model from which you can see three dimensions. Here we are testifying from a map on which we have only two dimensions.

The COURT.—What is the dip of the vein?

Mr. COLBY.—Q. What is the average dip?

A. The average dip is about 70°.

Q. 70° from the horizontal. It is a steep vein?

A. A steep vein. [100]

Q. Yes, a steep vein, the quartz is vertical. Now, give me the dip of the Blacktail vein down in the Blacktail claim, where we can all agree that there is a Blacktail vein.

Mr. GRAY.—You tell us where you agree there is a Blacktail vein first.

Mr. COLBY.—Well, Mr. Gray, I would be very glad to admit there is a Blacktail vein from 231 down to 212.

Mr. GRAY.—All right.

Mr. COLBY.—Q. What is the dip of that vein in degrees, and then give the direction of the dip?

A. I have not averaged my observations, but I will

(Testimony of Fred Searles, Jr.)

read off some of the local dips I have taken.

Q. No, I do not want to go into detail, I do not want to take up that time.

The COURT.—State in a general way what the dip is.

Q. About 45 to 50, I should say.

Mr. COLBY.—Q. 45 degrees. As I am laying this ruler, that would about represent the dip, that is in a general way? A. Yes, sir.

Q. This dipping off this way and the other one dipping this way? A. That is correct.

Q. One at 70 degrees and the other at 45, is that correct? [101]

A. Except that instead of one and the other I would say different parts of the same vein.

Q. One portion, we will call it vein to satisfy you, the portion which crosses the side-line of the Lone Pine, dipping at 70 degrees, and the portion of what you call the Blacktail down here in the Blacktail claim in the Blacktail winze, dipping at 45 degrees?

A. I might, however, make this correction, and that is that the portion of the vein over near the side-line flattens very considerably in depth. The dip on the 600 level is only 44 degrees and the dip in the bottom of the Last Chance is also substantially flatter than is the case in the upper part of the vein.

The COURT.—It gets flatter as you go down?

A. It gets flatter; yes, sir.

Mr. GRAY.—It is a good deal like going down the side of a saucer or soup plate.

Mr. COLBY.—Q. I think I brought out the fact

(Testimony of Fred Searles, Jr.)

that no ore has been mined on this portion of the Blacktail north of 231 and beyond the turn of these levels, 100, 200, 300, 400, 500, and 600, as it comes south?

A. I think you have brought it out. If you have not, such is the case.

Q. Another point I want to bring out in that same connection is what is the width of this so-called Blacktail vein as it crosses the east side-line of the Lone Pine?

A. It varies, of course, but is considerable, I [102] should think it was 12 or 15 feet. Possibly in some sections. in fact I know in some sections it is more than that.

Q. And where it comes out to the south end-line of the Lone Pine, it is from 4 to 3 inches, is it not?

A. I do not agree to that.

Q. I think you had a 3 inch exposure there.

A. I had a stringer of it that is 3 inches wide, yes, sir. It is a very substantial vein in the southerly end of the Lone Pine claim of 3 or 4 feet thick, of banded quartz. It has got gold in it, too.

Q. There is gold in most of these veins, too, isn't there? A. I think there is.

Q. There is gold in the discovery vein, isn't there?

A. I don't know.

Q. Would you say there was not from an inspection?

A. I would say that it looked extremely lean and hungry, but I would not say that it does not contain a trace of small value.

(Testimony of Fred Searles, Jr.)

Mr. COLBY.—I think I have about completed this witness, but there might be a few questions that I would like to ask him in the morning. I doubt if there is anything more.

Mr. GRAY.—You can call him back.

Mr. COLBY.—Yes, sir.

Mr. GRAY.—I just want to ask him one question on redirect, and then I am through. [103]

Redirect Examination.

(By Mr. GRAY.)

Q. I want to ask you, Mr. Searls, where it is that you can stand on the surface at the open stope near the contour of 2960 and actually see the bending and turning of that vein and of the banded quartz of that vein, around to have a southeasterly strike? Just mark that on the map.

A. You stand at the point marked G and see the commencement, the beginning of that turn in the open stope itself and can follow foot by foot or inch by inch from the side of that stope down along the croppings of that vein and see the turn which is not entirely referable to the fact that the vein is transversing the hillside. The vein itself turns, the structure turns, so that the red line is referable only in part to the fact that—

The COURT.—I understand that part of it. Down to what point?

A. The vein turns all the way.

The COURT.—I say down to what point did you trace it?

(Testimony of Fred Searles, Jr.)

A. You can trace it continuously to a point in the gulch there.

Mr. GRAY.—Mark it G–1.

A. Mark it G–1.

Q. That can be seen to-day, can't it?

A. It can be seen to-day.

Mr. GRAY.—That is all. [104]

Mr. COLBY.—Q. As a matter of fact, Mr. Searls, isn't there a break in the quartz as you go up that trench, so that for a certain portion of that distance you have pointed to there is no quartz?

A. Absolutely there is not. I followed continuously on quartz and banded vein through that distance.

Mr. GRAY.—The reason I asked that question is that if there should be a disagreement between us as to what one can see with the eye, we may request your Honor to go and look at it yourself. That is all, Mr. Searls.

Witnesse excused.

The COURT.—It is about the usual hour to adjourn, the Court will now adjourn until to-morrow morning until 10 o'clock.

(Thereupon an adjournment was taken until to-morrow, Tuesday, August 24th, 1920, at 10 o'clock A. M.) [105]

10:00 A. M., August 23, 1920.

Court convened pursuant to adjournment; present as before.

(Testimony of Fred Searles, Jr.)

FRED SEARLES, Jr., resumed the stand for further cross-examination, and testified as follows:

(By Mr. COLBY.)

Q. The positions of these trenches are approximately as you testified yesterday, with the exposures as shown in them placed in there so that they are relatively in the same position on this sketch as on the one of similar scale?

A. They are. I, of course, did not make the survey myself as to the location of those trenches, but I think it is correct, and the mapping of the quartz in them is correct with relation to the position of the trenches.

Mr. COLBY.—That is all.

Witness excused. [106]

Testimony of Jerome J. Day, for Plaintiff.

JEROME J. DAY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. Will you state your name, residence and occupation?

A. My name is Jerome J. Day; residence, Moscow, Idaho; occupation, miner.

Q. What relation have you to the plaintiff in this case?

A. President of the Northport Smelting and Refining Company.

Q. When did you acquire the Lone Pine Mining claims? A. In the year of 1916.

(Testimony of Jerome J. Day.)

Mr. GRAY.—By the way, Mr. Colby, it is denied in the answer that we are the owners or acquired it at that time, and if you are willing to admit—

Mr. COLBY.—Yes. The only reason for my denial was that we did not conform to the date of the acquisition of title.

Mr. GRAY.—I have the exact date here, and will give it to you in a moment.

Q. Have you had charge of the property ever since the Company acquired it? A. I have.

Q. I wish you would briefly tell the Court how long an experience you have had in mining, and in what capacities.

A. I started underground work as a practical man in 1891 or 1892, and have been continuously engaged in that occupation in its various forms from a practical standpoint since. [107]

Q. Have you prospected? A. I have.

Q. Developed mines? A. I have.

Q. Other than this mine at Republic, have you developed any other mines, Mr. Day?

A. Notably two, the Hercules and the Tamarack.

Q. Both of them are large producing silver-lead mines in the Coeur d'Alene mining district?

A. They are.

Mr. GRAY.—The date, Mr. Colby, of the acquisition, as shown by the abstract, is the 17th of July, 1916, by Mr. Day.

Q. You acquired this for the Northport Smelting and Refining Company?

A. I did. It is our usual procedure of acquiring

(Testimony of Jerome J. Day.)

property for one to take the title until all details are finished.

Mr. COLBY.—That is all right, we are not disposed to question the title.

Q. Mr. Day, I want you to briefly show the Court what work you did after acquiring this property for the purpose of developing?

A. After, we might say, a preliminary examination of the surface and such workings as were open and available, we drove out—this crosscut was run out somewhere in the neighborhood of the side-line of the Pine.

Q. By this crosscut, you mean this 300-foot crosscut?

A. On this 300-foot level.

Q. From station 190 to Station 161?

A. It was driven out to somewhere in the neighborhood [108] of the side-line. We continued that operation until we intersected what is apparently the Pearl vein. Some work was done along that. We drove out from the 400-foot level, crosscut in this direction.

Q. That is in a southwesterly direction?

A. In a southwesterly direction.

Q. From approximately northeast of Station 204?

A. Yes.

Q. To—

A. To 206, to a connection apparently with the Surprise vein. We drove from the 500 and from the 600-foot level several diamond drill holes having northerly and southerly directions. In none of this

(Testimony of Jerome J. Day.)

work within the Pine vein—

Q. Within the Pine claim.

A. Within the Pine claim do we find anything that would indicate a vein of commercial ore either in the diamond drill holes or in the drifts. [109]

Q. Now, before we go any further, you spoke of those as crosscuts, the four hundred particularly, it looks as if it is in the same direction as the drift upon the vein farther northeasterly.

A. As a term it is interchangeable with practical men, with very little distinction.

Q. You speak of the crosscut, did that follow a vein out?

A. It did not, from nothing except little quartz stringers in it.

Q. Did you follow those quartz stringers, or did they cross?

A. They apparently cross.

Q. Approximately as shown by the little lines on the map, Exhibit No. 2. A. Yes, sir.

Q. Now, did this 300 crosscut from 190 to 161 follow a vein? A. It did not.

Q. Let me first ask you, what were those driven for with the diamond drill?

A. To explore the ground out in here.

Q. That is, in the southwesterly corner of the Pine claim?

A. In the southwesterly corner of the Pine claim.

Q. Following that work what did you do and what was the reason for it?

A. I directed work to be carried on on the surface

(Testimony of Jerome J. Day.)

to trace any vein or veins that might be in that ground to get assistance to find them underneath the surface.

Q. You say to get assistance in finding them underneath the surface? [110]

A. To find out where the apex of any possible veins was.

Q. That was following the work in these crosscuts which did not disclose any vein in the southwestern corner of that claim? A. Yes, sir.

Q. What kind of work did you direct there and what did that work disclose?

A. I gave instructions that they sink pits upon any quartz showing that they found; later to connect those pits by trenches.

Q. Just point out to the Judge, then, what was done—and perhaps we had better go to the surface map for that.

A. Starting here at the end of what we term the stopes or where the stopes come to the surface—

Q. Marked "Open Stope" near Station 544?

A. Yes, sir, approximately in that point open pits were sunk; later connected up; following that continuously around to where we came into the gulch, at which point the wash is apparently quite deep. We then crossed the gulch and sunk pits close to a tree and along up across this end-line continuously, and later connected up either by trench or by tunnel.

Q. Mr. Day, right there will you state to the Court why you did not develop that vein across the bottom of the gulch?

(Testimony of Jerome J. Day.)

A. At this point there is considerable of a gulch coming down there that brings in quite a water shed. In breaking through there, in stoping, in seal, that might be caused by clay, that would necessarily by breaking that allow the surface water to go into these diggings. Any work that is done there must be carried on [111] with the idea that at this point directly below that gulch will probably have some connection with the surface such as water drainage—a watercourse. In the old workings all through here there is quite an amount of open ground, ground that is not filled, and it is connected up. Stopes in the Pine claim here are approximately 600 feet deep with very little or no filling. The levels are run out and the ore is extracted from the 200 down to the 600. It is extracted to bring into those workings surface water which would be a great detriment in future operations.

Q. The ground between those levels has been worked out? A. Pretty well worked out.

Q. There are large areas of open ground?

A. Yes, sir.

Q. The opening up of that in the bottom of the gulch, then, in your judgment, would endanger the flooding of the property?

A. It has that possibility.

Q. Now, then, Mr. Day, I want you to describe as a practical miner from your own observations of your work as it was going on and as it is to-day the tracing of the apex of this vein.

A. Starting on the 600 level on the Pine claim

(Testimony of Jerome J. Day.)

it comes continuously to the surface upon the vein except where the ore is removed by stoping, you can follow continuously around on this vein to this point here.

Q. Let us try to mark that.

The COURT.—To the gulch.

Mr. GRAY.—Point G1.

A. All right, point G1. Followed continuously upon quartz, vein matter, plainly to this point. You can go directly across the gulch, follow along with one slight interval across [112] the end-line of the Pine claim directly up to the Black Tail openings.

Q. In your judgment is that vein continuous around that bend and to the south end-line of the Pine claim? A. Beyond a doubt.

The COURT.—How far does the vein extend in the other direction?

A. From what point? This way?

The COURT.—Yes, sir.

Mr. GRAY.—Northeasterly.

A. I have been in the workings on the 200 that apparently extend well over into the Last Chance ground. It has been a number of years since that was worked and it is in a more or less of an abandoned condition.

The COURT.—All these workings in the Last Chance are a part of the same vein?

A. In my judgment, yes, sir. You can go directly through them, a physical connection there.

Mr. GRAY.—Have you traced the vein at all

(Testimony of Jerome J. Day.)

beyond the Last Chance? A. I have not.

Q. Now, coming back again to this surface map. You say the vein continues around there, and the quartz continues around. What is the fact as to your being able to observe the bending of the banded quartz within that vein?

A. That would follow closely the bending of the walls of that vein. Coming around there it is very noticeable to see.

Q. Where you last observed the vein at about the point G1 on the north side of the gulch, what direction has the vein and the banding of the vein? [113] A. A southerly direction.

Q. Where you last observed it on the south side of the gulch, what direction has the vein?

A. A northerly direction.

Q. What is the fact as to the vein at those two points pointing to—

A. Apparently directly opposite and pointing to each other.

Q. Now, coming down again to the Black Tail claim, you have said that in your judgment this vein continues on down to the Black Tail. There is an area through the northern portion of the Black Tail claim which is dotted upon the map where the vein is not developed. In your judgment as a miner, is there any question about the continuity of the vein from T–875 to the south end-line of the Lone Pine claim? A. There is not.

Q. Was this work, this trenching and the digging of these pits, prior to any litigation?

(Testimony of Jerome J. Day.)

A. Absolutely.

Q. Was it for litigation purposes?

A. It was not; solely for development purposes.

Q. To locate your—

A. To locate the ore bodies. [114]

Q. Was there anything that you observed to indicate anything concerning this vein other than the banding, as you have described it there, any faulting?

A. No, not such as are noticeable to a practical man.

Mr. GRAY.—You may examine.

Cross-examination.

(By Mr. COLBY.)

Q. As I understand, Mr. Day, you are testifying as a practical miner? A. Yes, sir.

Q. Did you take any notes underground?

A. I did not.

Q. During your observation? A. No.

Q. What is your relation to the plaintiff company? A. President of the company.

Q. How long was it after you acquired the Lone Pine claim that your company or some of your representatives attempted to acquire control of the Last Chance?

Mr. GRAY.—I think that is immaterial.

Mr. COLBY.—I think that has a bearing upon the motive of the witness and the weight to be given to his testimony.

The COURT.—Proceed.

A. To my knowledge, no man in authority

(Testimony of Jerome J. Day.)

negotiated for the Last Chance at any time.

Mr. COLBY.—Q. There was no attempt to purchase control of the Last Chance? [115]

A. Not so far as I know. As a matter of fact, refusal of stock tendered has been made.

Q. And when did you first get the idea that the Last Chance people were mining on ground that belonged to you?

A. Not until after these trenches were completed.

Q. And when was that? What date?

A. I don't know, say something approximately a year ago.

Q. That must have been more than a year ago.

A. It could have been. I had no idea of litigation and I am not fixing a time as to that.

Q. How long before the suit was filed did your company have the idea that the Last Chance people were—

A. (Interrupting.) Very shortly. As soon as we determined in our judgment that they have turned and crossed that line, crossed there—(indicating).

Mr. GRAY.—That is, crossed the south end-line?

A. Crossed the south end-line and crossed the east side-line. We gave notice immediately.

Mr. COLBY.—Q. And when you first took possession of the Lone Pine, you had no idea that the Black Tail vein ran into the Lone Pine?

A. Oh, no; I wouldn't say that.

Q. You didn't know where it ran? A. No.

Q. You didn't think that it made a junction with the other vein?

(Testimony of Jerome J. Day.)

A. I had no idea upon it when I purchased the Pine.

Q. Well, what is this vein here that has been stoped so extensively in the Lone Pine—what was that called at [116] that time?

A. All I know is the Pine vein.

Q. That was the main Pine vein?

A. No. In all our reference to it, I don't know as we ever designated it here or designated it as anything but the Pine vein.

The COURT.—Q. That was the only vein that was ever worked in the mine was it?

A. So far as I know.

Q. Where was the work on the Last Chance, where was the mining done on that?

A. Across from over here.

Q. That work was done by the Last Chance?

A. Yes.

Mr. COLBY.—Everything that is underneath the surface was done by the Last Chance.

Q. Have you been in other workings of the Lone Pine claim, any other workings?

A. Why, I have been around on the surface, been in the tunnel that runs off of No. 1.

Q. I believe you stated to his honor that there was no other mining done on the Lone Pine claim except upon this Pine vein?

A. Not to my knowledge.

Q. Did you examine the workings in No. 4 vein?

A. No. 4 vein?

A. Yes.

(Testimony of Jerome J. Day.)

A. I don't know what No. 4 vein is.

Q. You don't know No. 4 vein? A. No. [117]

Q. Never heard of it? A. No.

Q. Then I will point to this vein here which passes through points 152, 153, and 128–C, the veins in that vicinity; did you ever see any work done on these? A. Yes, sir.

Q. Mining? A. Some stoping done in there.

Q. Then there was stoping done on the Lone Pine? A. Yes.

Q. In other places than the main Pine vein?

A. Yes, sir. And in this vein here.

Q. Now, you stated, I believe, that the reason that you did not turn any of these workings and cross into the Black Tail was the fact that you might get under that watercourse?

A. No, I didn't state that.

Q. What was your statement?

A. My statement was the reason I didn't connect that was to get that surface water.

Q. Now, if you had the Black Tail vein on any of your workings underground here, why didn't you turn the 600 level?

A. Why, if there was any pay ore there—or to put it in another way: The principal reason for mining this is for silica for the smelter rather than for its mining value. It carries an appreciable amount of both gold and silver, but is such a low grade ore—and we only mine such ore as the smelter requirements necessitate. At the present time we are getting it from the Quilp.

(Testimony of Jerome J. Day.)

Q. And yet in each of these levels, did you turn into [118] what you call the Lone Pine vein?

A. Well, we are on it all the time.

Q. On the Black Tail vein, I should say.

A. Well, we are on the Black Tail.

Q. Where do any of these levels which you have been working along show any turn to the southeast to connect up with the direction of the Black Tail vein as shown in the Black Tail claim?

A. Right at that point.

Mr. GRAY.—Name it.

A. It is this point here; it is marked 57 Star. We will say westerly from point 179.

Q. What is the direction of this quartz in there at that point?

A. I can't give the direction, but it has a southwesterly swing to it.

Q. Wasn't that a variation that would occur in any vein?

A. No, I can't say it would occur in any vein. It occurs in this vein.

Q. Why didn't you, in the interests of this litigation, turn that working and follow over into the Black Tail claim?

A. How much would you estimate it would cost to drive across there?

Q. You don't need to drive across. A few feet would show the direction of that.

A. I think it is sufficiently shown there.

Q. And you think that is stoping in the direction of the Black Tail vein? [119]

(Testimony of Jerome J. Day.)

A. I think it is; from a practical standpoint, yes.

Q. Now, we have another working up here passing through point 343 and extending to the east. Does that follow a vein?

A. Hardly what you would call a vein from a practical standpoint.

Q. What do you call that? A. An exposure.

Q. Does that indicate a turn in the direction of the Black Tail, in your opinion?

A. Not at that particular point.

Q. Now, how much ore did you ever take out of the workings in a direction southeast, extending southeast? A. I don't know as I can give it.

Q. In any workings beyond the stopes and the mining that appears on these various levels, 200, 300, down to 600.

A. I would say that all of the ore on the 600-foot level, all that has been mined from the 600-foot level; practically all that has been mined from the 500-foot level; some of the ore up in here—

Mr. GRAY.—Out in where?

A. Some of the ore above the 400 level—as I remember, the 500 shaft was down to the 500 level when I purchased the property and some stoping done over here.

Q. I don't believe you got my question. My question is; ignoring the mining that has been done in the general trend of these various levels, from the 100 down to the 600, where have you mined any ore in the Lone Pine that has turned in the direction of the Black Tail? [120]

(Testimony of Jerome J. Day.)

A. It has all turned. That is what I am answering your question. With the 600 here from the shaft down here, is in the direction of the Black Tail.

Q. Isn't that a very decided angle as compared with the Black Tail vein over in the Black Tail ground? A. I don't know.

Q. I say beyond this parallel direction, to the south, and turning to the southeast, where have you mined any ore?

A. I think at a point approximately 219. [121]

Q. In all your exploration, then, beyond these various levels as they are shown on this map colored in red extending to the southwest, you have not taken out any commercial ore, have you?

A. Beyond the extremities of these levels?

Q. Yes. A. No.

Q. Have you seen these cuts on the surface, T–840, T–839, T–838 and T–901?

A. I have seen cuts at approximately this point upon the ground.

Q. And what is exposed in those cuts?

A. At this point there is considerable quartz.

Q. What is that point?

A. That is, we will say, taking that point means the intersection of the blue line with the black line of T–840.

Q. It is right on the west side line of the Lone Pine?

A. The Lone Pine, yes. I would say that there is about 24 inches of quartz there and other matter

(Testimony of Jerome J. Day.)

right on the surface close to the railroad.

Q. What did you find in T–839?

A. Lesser amount of quartz.

Q. And T–838? A. Lesser.

Q. And in T–901? A. Very little, if any.

Q. Now, as a matter of fact, doesn't that quartz increase in width as you go northeasterly?

A. No.

Q. You don't agree, then, with this 10-foot detail map?

A. I agree that there is quartz showing here, to my [122] judgment 2 feet.

Q. Two feet.

A. That there is lesser quartz here.

Q. And you do not agree with the coloring that has been placed upon the ten-foot detail?

A. Not as I saw it. And at this point here.

Q. Where is that?

A. I located that practically under a timber-shed.

Q. That is at the extreme northern part of these pencil cuts that they have put on here?

A. Yes. Very little quartz.

Q. And what is the general direction of that quartz exposure through those trenches?

A. I would say northeasterly.

Q. It is approximately parallel, is it not, with what you called, when you first went on the Lone Pine ground, as the Pine ground, as the Pine vein?

A. Parallel?

Q. Yes, in strike. A. No.

Q. You would not call it so?

(Testimony of Jerome J. Day.)

A. No. The strike of the Lone Pine, when I went on it was known then up to the open stopes had more of a bearing to the north, or this one bore more to the north than the Pine, looking at it from this direction.

Q. The strike of the Pine vein is shown in the No. 200 level, is it not? The general strike in that vicinity is shown by the direction of the level, isn't it? A. The 200?

Q. Yes. [123] A. Yes.

Q. Will you place your pointer right along that level. A. Taking it from this point to—

Q. No, you have the 100.

A. No, this is the 200; that is the 100 there. That would be we will say to this point here from the sideline, the direction of the strike.

Q. Isn't that approximately parallel to the exposure you have got in the cuts?

A. No, not at all; the exposure in the cuts will show considerable difference.

The COURT.—The map, of course, speaks for itself.

A. Yes. The red ink will show the different points.

Q. Now, as I understand it, you asked your employees to open up quartz wherever it showed on the surface.

A. Not wherever it showed. Wherever they had good showings.

Q. Why didn't they open up the quartz that was shown in these trenches?

(Testimony of Jerome J. Day.)

A. In here (indicating)?

Q. Yes.

A. Because it was exposed in a railroad cut there.

Q. And you were not interested in having it opened up as it went into the Lone Pine claim and approached these other workings?

A. Not directly interested one way or another. I think that is all that is in sight is there. All that there is is practically there.

Q. You think that showing there is limited merely to [124] these particular trenches, and it does not go down?

A. I would not say that it does not go down.

Q. It does not extend in either direction?

A. Oh, I don't think it extends any considerable distance from those cuts.

Q. You are only willing to testify to what you actually see? A. Actually see.

Redirect Examination.

(By Mr. GRAY.)

Q. In connection with that there is one question I would like to ask. As a matter of fact, in which direction did you start that surface work from that open trench, and what did you find?

A. We started virtually from the open stope and followed quartz clear down to the gluch.

Q. So that what you followed there was the vein?

A. It was.

Witness excused. [125]

Testimony of James C. Ralston, for Plaintiff.

JAMES C. RALSTON, called and sworn as a witness on behalf of the plaintiff, testified as follows on direct examination.

Direct Examination.

(By Mr. GRAY.)

Q. Will you state your name, residence and occupation?

A. J. C. Ralston; Spokane; mining engineer.

Q. Mr. Ralston, where were you educated for the practice of your profession, and what experience have you had in its practice?

A. After taking a course in civil engineering, in about 1906 or 1907, I began the study and the practice first, of mine surveying, which, of course, led immediately into the simpler forms of mine engineering, and from that on through to the present day, on studies and examinations and professional work in all of the western mining states, or practically all of them, including British Columbia, covering a period of about 20 years.

Q. The character of that work, Mr. Ralston, just in a general way, has it been in the development of properties and advising concerning development and investigation of them and so forth? Just state in a general way the character of the work that you have done.

A. Very largely in examinations, in advisory work, in operation and in development, particularly in development, and attendant work looking to the

(Testimony of James C. Ralston.)

opening of mining properties and the developing of them in different camps.

Q. Have you ever been a deputy mineral surveyor? A. Yes. [126]

Q. And as such had occasion to survey claims for patent and observed them upon the surface?

A. I have.

Q. How long have you been acquainted with the Republic district? A. Since the spring of 1897.

Q. And how long have you known the Lone Pine Mining claim? A. Since the summer of 1897.

Q. How did you happen first to become acquainted with that property?

A. I was the engineer for the Republic Mining Company, and negotiations were evidently in hand for the purchase or acquisition of the Lone Pine properties, and as the engineer for the Republic people, I was requested to go up, look it over, and make some surveys and ultimately make surveys for patent.

Q. And you did that, you say, in the summer of 1897? A. Yes.

Q. When you first went there, who went with you, if you remember? A. You mean over the ground?

Q. Over the ground.

A. Well, the owners or the locators of the property, that is, of the Lone Pine property.

Q. Their names.

A. Such as Mr. Phillip Creasor and Mr. Tom Ryan, as I recollect. I am not quite so sure of Ryan being along, but it is my recollection that he was. [127]

(Testimony of James C. Ralston.)

Q. That was prior to the time you made your official survey?

A. That was looking over the ground to familiarize myself with the location of the property in general and its location stakes.

Q. Who pointed out the property and the stakes and the objects to be observed upon it at that time to you? A. Mr. Creasor, principally.

Q. Now, Mr. Ralston, subsequently you did make the official survey of that claim for patent?

A. I did.

Mr. GRAY.—Mr. Colby, I want to introduce in evidence the field-notes and the copy of the plat as well as the copy of the location notice.

Mr. COLBY.—Where did you get your field-notes?

Mr. GRAY.—I got them from the surveyor-general.

Mr. COLBY.—I have the patent record.

Mr. GRAY.—I might introduce that?

Mr. COLBY.—Yes, and you won't have to introduce your location notice or your field-notes. The only thing is the plat, and I haven't the plat.

Mr. GRAY.—Then I will offer this. There may be things in the patent record I do not care to vouch for.

Mr. COLBY.—Sure.

Mr. GRAY.—But the patent record and the official plat. I say to you, Mr. Colby, and to your Honor that this is the amended plat. There is no difference between the original and the amended, ex-

(Testimony of James C. Ralston.)

cept that the conflict between the Last Chance and the McCawber was claimed in the original and excluded in the amended. [128]

Mr. COLBY.—It has nothing to do with this case?

Mr. GRAY.—It has nothing to do with this case. It is an amended survey, because in the first survey, they claimed a conflict with the McCawber. It had gone to patent, and the surveyor-general required them to exclude it. Those may be marked as our exhibits.

(Patent and plat marked Plaintiff's Exhibits 11 and 12, admitted in evidence and are made a part hereof.)

Mr. GRAY.—Q. Now, Mr. Ralston, without the necessity of my questioning you on what you observed there, will you state to his honor, how you approached that claim and what you observed with reference to the presence there of any vein or veins, and their apparent course, what croppings if any, were shown upon the surface of the ground and seen by you at that time?

A. After having gone over the property to ascertain the location of the various original stakes, we then proceeded to go over the general hill, ascertaining first the location of the end-line stakes. It seems that it is a requirement of the Federal law to lay down a theoretical lode line. Sometimes that lode line is defined by stakes, sometimes by works on the ground, and sometimes by a combination of both. And in order to lay that line intelligently, it was necessary to ascertain all of the physical facts

(Testimony of James C. Ralston.)

on the ground in connection with the staking. I therefore looked up the discovery as marked on the official plat, the discovery improvement No. 1. We looked up the end-line stakes and follow over the ground substantially along the territory which [129] would be defined by the lode line through here (indicating). At the north end, from the north end-line stake standing somewhere about where I hold my pointer, in the center of the north end-line, and for a distance of perhaps 150 feet south, a rather sharp bit of topography is defined as shown by these contour lines, such as a man on the ground might call a hog back. At the lower or southerly end of the most prominent part of that feature of the topography some quartz and what appeared to be typical croppings of vein matter appeared, and fitted rudely the general direction of a straight line drawn through the center of the claim. Still further croppings were to be found perhaps in the vicinity of the Letter "N" of the word "Lone." Still others again as the discovery cut was approached in the form of apparent croppings under old large trees, some of which stand to-day and others are down, and so on down to the discovery, continuing along that line on the theory of seeking to ascertain a justification for a lode line in that particular territory, viz., the center of the vein. Croppings were noted at a point westerly or perhaps northwesterly of the southwest end of the open stope.

Q. Just point that out.

(Testimony of James C. Ralston.)

A. That would be in the vicinity of No. 545.

Q. Also mark 203–C? A. Yes.

Q. On Exhibit 1. What kind of a cropping was that?

A. That was rather a strong quartz cropping, and that was the last of any physical evidences of anything which would justify the definition of a lode line. The [130] rest is wash and gulch, but it constituted in my judgment, sufficient evidence to lay with a good deal of confidence a lode line substantially as it has been laid, defined as being the general direction of the vein.

Q. Was Mr. Creasor at these various places at one time and another with you in your visit?

A. I think so.

Q. This cropping—I want to call your attention to the cropping near the open stope. Was that observable for any distance from there.

A. Yes, quite a distance.

Q. Where can you see it?

A. Well, this is the whole—as these green contour lines show, this is a hill sloping southerly, and is visible from the territory further south in looking north.

Q. That is, from the Black Tail?

A. From the Black Tail, almost from any point on the Black Tail vein. It is particularly visible from the old Black Tail croppings. As for instance, in sighting along over here, from the extension of the Black Tail into the Lone Pine, one may see this whole face of the hill from about this point,

(Testimony of James C. Ralston.)

namely 578 on up to substantially the top of the hill, or near the discovery cut; and at the present time also you can see these workings.

Q. Can you see those croppings to-day?

A. These croppings are rather conspicuous and can be seen quite plainly.

Q. Those croppings I understood you to say are quartz? [131] A. Yes, sir.

Q. Coming back again to the Black Tail, could you observe the croppings at that time of the Black Tail vein going up northerly or northwesterly through that claim? A. Yes.

Q. Are they observable to-day, Mr. Ralston?

A. Quite conspicuously.

Q. What do they consist of? What is the character of that cropping there?

A. Well, they are croppings largely of quartz, some vein matter well defined along the side of the hill in the form, in many cases, of the little miniature escarpment there, 3 to 5 or 8 feet high, breaking the average slope of the hill enough to define this plainly. [132]

Q. Then at the time, as I understand it, at the time you made your patent survey, there was known and observed by you and by the others who were there the croppings at 203–C and at the point marked discovery cut and on up at various places toward the north end of the claim? A. Yes.

Q. Therefore, I leave that, Mr. Ralston. What was your opinion at that time as to the course of the vein?

(Testimony of James C. Ralston.)

A. That it was a north-south vein or substantially north-south, a continuation in other words of the Black Tail.

Q. Did you know the name of the claim lying to the south of the Black Tail?

A. The claim south of the Black Tail at that time?

Q. Yes, sir. A. I have forgotten.

Q. All right. Have you prepared a map of the claims in the Republic district at any time.

A. Yes, sir.

Q. Have you had that enlarged so that a copy of it is here in court? A. Yes, sir.

Q. Will you mark this Exhibit No. 13. This is marked "District Map of the Eureka Mining District." The small map from which this has been prepared was originally compiled by you?

A. Yes, sir.

Q. Won't you point out to his Honor the claims in question here?

A. Here is the Lone Pine, Pearl, Surprise, Black Tail, Last Chance (indicated). [133]

Q. That map shows the claims as they have been laid out and patented in that district?

A. It does. Q. Where is north?

A. North is right up at the top of the map.

Q. At the top of the map. What is the general course of the veins in the Republic camp in Eureka Mining district as you know them?

A. The general average course of the veins in that part of Republic camp known as the Eureka Creek district all have a slightly northwesterly direction;

(Testimony of James C. Ralston.)

that is to say, northwest and southeast. They are represented pretty generally by the direction of the claims. The fact is that in my judgment there are few camps in the country where the location of the veins and the locations as laid on the ground have been so intelligently and well done and later development has tended to disturb least. These define very well the direction of those veins.

Q. Now, Mr. Ralston, at the time you made your patent survey was there any work done upon the Lone Pine claim?

A. Yes, the principal piece of work was a tunnel.

The COURT.—Was the patent survey work done at the same time you spoke of in 1897?

A. The original patent survey work was done in 1897 and amended in 1898, I think it was.

Mr. GRAY.—That is what it shows in the field-notes?

A. I have forgotten.

Q. It is shown in the field-notes, the original in July 1897 and amended in 1898?

The COURT.—I just simply wanted to know the date you had [134] reference to is all, whether 1897 or 1898.

A. The amended survey of the year later or thereabouts is more of an office matter of calculation excepting—

The COURT.—I don't care, only for the dates to which Mr. Gray refers.

Mr. GRAY.—Mr. Ralston, where was this work done at the time of the patent, on the Lone Pine, just

(Testimony of James C. Ralston.)

show it to his Honor, will you please?

The COURT.—Can you point it out on the map?

Mr. GRAY.—Show it here.

A. It is that part of the yellow colored tunnel the portal of which begins near a point marked 519 and extends in a direction substantially parallel to the claim for a distance of about 150 feet or thereabouts, somewhere about to a point a short distance north of the so-called open stope or to that first cross red line on the yellow tunnel.

Q. What other work was done there at that time?

A. The discovery cut and a shallow surface cut at a point marked "Discovery Trench." It is a short trench perhaps a couple of feet wide and perhaps 10 feet long.

Q. How deep?

A. I should say not to exceed 1 foot. The bedrock crops practically at the surface and it is a mere digging out of the debris and rough edges possibly to define what could be defined merely as a trench.

Q. Now this work at this first tunnel was done from out of the point marked Pine 100, wasn't it?

A. Yes.

Q. On surface exhibit 1? A. Yes. [135]

Q. And pointed towards the croppings that you have heretofore described to his Honor approximately?

A. Yes, running approximately toward these croppings.

Q. Now, passing your official survey, what has been your subsequent acquaintance with this property?

(Testimony of James C. Ralston.)

A. Since the survey for patent I have been upon the ground a great many times, looking it over, following the developments as one naturally would who is interested in seeing the developments of that part of the country and of late going up and looking over the property again at the request of yourself.

Q. That was for the purpose of this lawsuit?

A. For the purpose of this lawsuit, yes.

Q. Since this lawsuit was started you have carefully examined, have you, that ground and all of the workings which are open? A. I have.

Q. I want you to state to his Honor, without going into detail as to workings, what you have found with reference to the position of the vein there as it is now developed and its relation to the lines of the Lone Pine claim.

A. In a word, I think I can summarize that by stating that after following through the developments, both on the surface and underground, seeking to trace out the continuity and identity, I have come to the conclusion that the vein in question is defined on the surface substantially as shown on Plaintiff's Exhibit 1, viz., in red, where it crosses the south end line of the Pine and continues by being delineated in red, both solid and broken through various surface workings, swinging around in a northeasterly direction past certain open [136] cuts, so marked, and open stopes to the intersection of the east side-line of the Lone Pine claim.

Q. At station?

A. That is at station marked 542.

(Testimony of James C. Ralston.)

Q. Just go on and state the character of the vein as you observed it around there and what you observed with reference to the bending of the vein.

A. The vein at the surface as developed largely by the breaking through of the stopes from the lower levels shows itself to be a well defined, conspicuous vein, having strong—at least a very strong footwall clearly susceptible of a continuous following and in width from perhaps three or four feet to six, seven or eight in many places and can be followed as I have stated around this red line partly or I might say wholly first by the croppings and conjointly with the workings to the vicinity of a trench, open stope so-called on this plat, where a decided curve is found swinging and carrying the vein around to a southerly direction. So strong, in fact, are those lines of the curve, that at first I was disposed to think they must be a series of intersecting features; but on careful examination of the wall, and particularly the footwall it showed so clearly I found, especially in the vicinity of the works, open stopes, it is a well-defined surface as clearly to be followed and seen as the wall behind your seat.

The COURT.—At what point could you so follow it?

A. All the way through from the opening seen at T–897. There is a stope there which terminates up here and you can see by looking in that stope there, you can see by looking in underneath through the large open stopes, and see this [137] wall quite

(Testimony of James C. Ralston.)

plainly from that point or from any point along the big open stope itself.

Mr. GRAY.—Running to where, south?

A. Running to a southerly point down and under the line which defines the southwesterly end of the so-called open stope. For instance, somewhere near where I hold my finger on there, about halfway between 2920 and 2940 or perhaps one-third of the way between these two contours. The west end of that stope ends or continues on down to the 200 level but at the surface from that point on the trench as shown by this full black line may be followed and in that trench may be followed the vein as shown here in red on around through the curved workings and followed with a great deal of precision to the line of separation clearly between the vein and its enclosing footwall country can be traced quite as definitely as we would trace the distinction between the edge of this carpet and the oak floor on which it rests.

Q. And then around to what point?

A. Around to the southerly end of the open cut at 552.

The COURT.—That is in the gulch is it?

A. Nearly to the gulch. Here an old trail passes through the opening between the end of that cut to 552 and the beginning of the next smaller cut marked G1. There again the vein is traceable down for 2/3 of the distance of that cut, the last quarter of which or the last one-third of which is in silt and debris and so the vein at that point is seen to pass under the wash of the gulch and so is lost to definite sight so far as

(Testimony of James C. Ralston.)

the lower end of that cut is concerned. Then going across the gulch proper, that is the very bottom of the gulch which is filled with wash and a little trickling stream, and up on the other side, or slightly up—only a few feet— [138] we encounter the northerly end of the trench which is marked T–843. Here again the vein is found quite as clearly defined within the enclosing country rock and may be followed up through that trench more or less continuously to the end line.

Q. Is there any question as to the identity of the vein in T–843 and the identity of the vein as you leave it at G1?

A. Not to my mind, no. It has all the physical characteristics, one similar to the other and satisfy those ordinary demands of identity which I would say are ordinarily employed by the miner or the engineer in seeking to make identification.

Q. Coming south, to the south end-line of the Lone Pine claim, have you observed the vein as developed in that end line trench and tunnel? A. I have.

Q. In your judgment is that the same vein which you have followed and described around the bend?

A. Yes, without any question. It is true it is slightly broken but there is no question in my mind as to its identity. It is the same typical vein matter or vein stuff.

Q. Mr. Ralston, will you just follow that vein on to the South if you can do so?

A. South of the Lone Pine end-line for a distance of possibly 80 or 90 feet—90 feet say—the ground is

(Testimony of James C. Ralston.)

covered with a thick hillside wash obscuring the bedrock and any croppings which might exist if the washings were eroded or carried or wheeled away; but at or in the vicinity of T–875 or at T–876, T-883, T–886 I believe and so on down as shown by the red line the vein may be traced with the same [139] ease that it has been traced on the Lone Pine.

Q. Is that the same vein in your judgment?

A. Yes, sir. I think there is absolutely no question whatever but that is absolutely the same vein. It has all the elements of identity, common characteristics, dipping roughly about the same, certainly pointing in the same direction and lying in about the same general plane.

Q. Mr. Ralston, have you traced this vein downward so as to be able to state whether or not it does extend downward from the apex in the Lone Pine which you have described to meet the surface of the Last Chance mine?

A. I have followed it from the surface as you say to the lowest level shown on these plans, viz., 600.

Mr. COLBY.—We don't deny that point.

A. I made such a tracing and have also followed out in a general way the existence and verified for myself the existence of the vein within the various workings from the 600 up to the surface and within these workings, so far as they extend or so far as the vein shows within the workings both to the north and to the south.

Q. Now, with reference to the character of that vein and its banding, will you just briefly discuss that

(Testimony of James C. Ralston.)

to the Court and describe it to the Court as you observed it?

A. Well, when I spoke a moment ago of earmarks and characteristics, I mean by that first that the appearances of the quartz within the vein has rather the same individual and distinctive nature by reason of the banding of the quartz itself as it lies in position and as it lies, for instance, against the footwall. The footwall, on the other hand, is noticeable and definite by reason of the separation and by reason of the color and character of the footwall country as against the quartz [140] or ore material or vein stuff; so that the line of separation is not only observable from the standpoint of what I have described, but has as a rule a blanket, a thin sheet or thin blanket of so-called *gogue* which further constitutes an element in the separation of the vein from the country rock. Aside from these general earmarks, it is true that with respect to that vein and all veins, there are certain general earmarks which may not always be susceptible of oral definition, but which are undoubtedly elements to be clearly seen and observed. So that the whole combination makes a picture in a man's mind such that he clearly sees that vein and can clearly identify it within the general limits of identification as a vein within a limited area such as this under discussion. So that the vein, I think, may be clearly defined and clearly recognized for the extent to which it has been developed. [141]

Q. Mr. Ralston, I directed Mr. Searles' attention to the conditions as they exist to-day, and I desire to

(Testimony of James C. Ralston.)

direct yours. Can one stand at the northerly end of the open stope which extends northeasterly from Station 544 and observe the bending of the vein and the bending of the bands within the vein from there around the turn where it changes *it* course?

A. Yes. You can very clearly so far as the open void is concerned, the open space there, one may stand and place one's arms in this direction and set a parallel to the distinction of that course so clear or so conspicuous and so one might say almost uniform in sweeping around without any interruption.

Q. Now, let me ask you another thing. Is it unusual in your experience to find veins crossing, bending, changing their course?

A. No, it was quite the common customary conditions to be found all through nature. Nature does not, as a rule, define any fissure or any vein as a perfect mathematical plane.

The COURT.—In other words, it does not run in straight lines?

A. It does not run in straight lines. Not only does it not run in straight lines, but the void or opening pinches. An old prospector up in that country once said: "She pinch and then she bulge and then she pinch again, but the identity remains."

Mr. GRAY.—You may inquire.

Cross-examination. [142]

(By Mr. COLBY.)

Q. Mr. Ralston, your first visit to the vicinity of this mine and to this mine was for the purpose of making a survey was it not, for patent?

(Testimony of James C. Ralston.)

A. That is my recollection.

Q. And it was not for the purpose of directing mining operations or as a mining engineer?

A. Not that claim.

Q. When did you afterwards visit that mine after your trip there in 1897?

A. Probably several times during that year.

Q. And then again you visited it in 1898?

A. Yes.

Q. That was for what purpose?

A. Well, among others to see that the stakes were described correctly on the amended survey.

Q. You made that amended survey in 1898?

A. The survey as I recollect it, was in 1898; a year later an amended survey.

Q. Did you visit the claim any other times during that year?

A. I think probably a number of times, I am sure that I did.

Q. You spent a good deal of time in that vicinity during those two years?

A. In the whole time; yes, sir.

Q. How about the year 1899? A. More or less.

[143]

Q. When did you first change your idea which you obtained when you made your patent survey that there was a vein running down through the middle of the vein, and determine otherwise in your mind?

A. Well, the vein running down through the middle of the claim, you, I trust, are not getting mixed up now as to my testimony in defining the theoretical lode line and the manner in which I sought

(Testimony of James C. Ralston.)

to seek justification for that—I trust you are not mixing that up with the vein as developed.

Q. I understood you to say that there was enough indication there running along the middle line to lead one to believe that there was a vein generally following that course of the lode line. A. Yes.

Q. Now, when did you come to conclusion that that was not the case?

A. Definitely and finally on a visit made about a year ago.

Q. And after that time you still believed that there was a vein running northwest and southeast through the claim? A. Yes, sir.

Q. Now, this No. 1 tunnel that you pointed out as being in a certain number of feet at the time you made your patent survey was later extended, was it not? A. Yes.

Q. Did you ever visit the tunnel and the workings in there later on? A. I did about a year ago.

Q. And not after you made your patent survey? [144]

A. No, sir; not to my recollection at any time until about a year ago.

Q. You did not gain any information in those early years which would lead you to believe that there were cross-veins coming through the Lone Pine claim substantially or nearly at right angles to the general length of the claim? A. I may have.

Q. When did you get that information or get that idea?

A. I could not say for sure. Some time within

(Testimony of James C. Ralston.)

the period of 20 years, but to fix any date would be very difficult.

Q. You did not know anything about what may be termed No. 2 vein?

A. What do you mean by No. 2?

Q. You never heard of the No. 2?

A. Well, I heard of four veins on the property from gossip among the men.

Mr. GRAY.—I would just as soon you would leave the gossip out, Mr. Ralston.

A. From the standpoint of numbers, that was all the information that came to me.

Mr. COLBY.—Q. But not from actual observation?

A. Oh, yes, I saw at a later time these several veins.

Q. Could you fixed that period of time?

A. No, I could not; not very well. I would not like to. [145]

Q. It was not recently?

A. That was some time ago.

Q. When did you stop visiting the Republic Camp, so that you were not up there frequently, as you were in the early days?

A. Probably in 1903 or four, possibly.

Q. And since that time, most of your work has been civil engineering rather than mining, hasn't it?

A. No, since about in 1897, perhaps half of my work, as I said before, has been civil, and half has been mining work.

Q. You do not know anything, then, about work

(Testimony of James C. Ralston.)

that was carried on in the drift from No. 1 tunnel on what I call—there seems to be some objection to calling it that—

Mr. GRAY.—None at all, Mr. Colby; call it what you please.

Mr. COLBY.—It passes through points 150 and 153. You have no knowledge of work done in that vicinity?

A. I have knowledge of such work being done. I examined it very carefully last year.

Q. The result of your last visits?

A. The last visits.

Prior to that time, you did not know anything about any mining work?

A. I am not sure about that; I might have.

Q. Did you know anything about the value of the ore taken out? A. I doubt it.

Q. And the amount of stoping done. [146]

A. I doubt it from memory. If I did, it was possibly from reading, from compilations of matters that I might have gone over years ago.

The COURT.—If counsel will put it personal knowledge.

Mr. COLBY.—Yes, I do not care anything about gossip or what you learned from others, but you are quite clear as to the acts which you performed on the ground in 1897 when you made your patent survey? A. Yes, sir.

Q. That was in 1897, but you were not very clear about your knowledge of mining and stoping on any lateral veins that might be cut by the No. 1 tunnel in those early days?

(Testimony of James C. Ralston.)

A. Well, whatever there was, I am indefinite about it now, because, as I say, many times I visited the property, but like many other properties visited it to see how it was going along without having a clear, definite recollection after ten or fifteen or twenty years.

Q. Did you ever make a report on this property to anyone? A. I did.

Q. To whom?

A. I cannot remember now to whom. I remember distinctly having made a report.

Q. Did you make a report to a Mr. Burleigh?

A. I would not say that it was Mr. Burleigh.

Q. Did you make a report at his request or for his information, or Mr. Leckie, Major Leckie?

A. It is possible. [147]

Q. About what time did you make such report?

A. If I did make such a report, that probably would have been—well, it would be hard to fix that definitely—possibly in 1899 or 1900, perhaps 1901 or 1902, but I would not say definitely.

Q. Did you ever make any maps of this Lone Pine claim about that time, showing the course of the veins to be found in the claim of your knowledge at that time?

A. It is possible that maps were prepared on account of my reports.

The COURT.—I think if reports were made, or maps were made that long ago, that the witness' attention should be called to them.

Mr. COLBY.—Yes, sir.

(Testimony of James C. Ralston.)

Q. Well, I will call your attention to a little flat here. I show you now what purports to be a plat of the Pearl and Surprise claims, Republic, Washington, U. S. A., with the date March, 1899, on it, and J. C. Ralston, M. E., which is a cut, a reproduction evidently made from an original plat. I want to know if you made the original plat from which that cut was taken

A. It looks very much like work; I probably did.

Q. Have you the original of that?

A. I doubt it very much.

Q. But you do not remember these facts connected with this particular plat as well as you do the facts connected with your patent survey?

A. No, I confess frankly I do not. I do remember having made a report, now that you speak of it, very clearly, [148] very well indeed.

Q. And this plat shows two lateral or cross-veins crossing the Lone Pine in rather heavy lines, and then a dotted lateral or cross-vein, does it not?

A. That shows two cross-veins across the Lone Pine for its entire width, and indicating, though both those cross-veins contain the Pearl Surprise vein, there was a period in the traditions of the camp and in the history of that region when the idea of the north south vein was abandoned and it was believed that there were cross-veins, and it was evidently during that period that those were developed. A later period has followed since, it is true, when by virtue of development other facts are shown, those cross-veins are known to exist.

(Testimony of James C. Ralston.)

Mr. COLBY.—I would like to introduce that as an exhibit.

The COURT.—It will be admitted.

Mr. GRAY.—It is given a continuous number and marked Defendant's Exhibit No. 14.

Mr. COLBY.—Q. I show you what purports to be a copy of J. C. Ralston's report on the Lone Pine-Surprise Consolidated group of mines of Republic and ask you if you recognize that as a copy of the report which you just referred to which you possibly made for Major Leckie or M. Burliegh.

A. Well, that is a pretty old document. Well, it might have been made by me, I would not say. As I say, I remember of having made a report, but this as the report, is evidently incorrect, because it is not signed by me, nor [149] has it got my writing or notations, and yet, I do not say but what it is from a copy.

That is all I asked you. I did not ask you if it was the report, but if it was a copy.

A. That may be; you could not prove it by me, however.

Q. Have you a copy of that report?

A. I doubt if I have.

Q. Well, would you be so good as to look among your effects and see if you could find a copy?

A. If the report is anywhere it is here, because I made an effort to find some of my old information of notes and surveys and reports. I fear that the whole thing was burned in the San Francisco fire. I moved down there, or at least had an office there

(Testimony of James C. Ralston.)

for several years prior, and in shipping down, my man here in shipping down some of my records, did ship down a lot of the old Republic and I am not sure but what it is in that. I have never been able to ascertain satisfactorily.

Mr. COLBY.—I will read portions of this and ask you—

The COURT.—If you will allow counsel to examine it during recess it will probably save time. Just hand it to him and let him examine it during the noon recess.

Mr. COLBY.—Yes, sir, but I may go ahead and ask questions from the report, may I, and ask him whether he recollects whether he had that opinion at that time?

The COURT.—Yes, sir. [150]

Mr. GRAY.—Better let him read the whole report. Let him do that.

Mr. COLBY.—We can put the whole thing in. I intended to put it in myself later on and identify it.

Mr. GRAY.—Let him identify it.

Mr. COLBY.—Then in the interests of expedition we might postpone that.

The COURT.—If Mr. Ralston is unable to identify it, unless counsel can agree upon it, I do not see what can be accomplished by it.

Mr. GRAY.—If you will let Mr. Ralston read it through.

Mr. COLBY.—All right, I will let you look at it, Mr. Ralston, and see if you can refresh your memory and determine whether that is a copy of the report you made.

(Testimony of James C. Ralston.)

A. It will take 15 minutes now to read this over; there are four pages here.

Mr. COLBY.—I would like to, in the interests of expedition, to hurry this thing up, but I do not see how we can avoid this.

The WITNESS.—I do not mean to be technical at all myself, or—

Mr. GRAY.—No, I am not going to be either.

The WITNESS.—Whether this is it or not, I am not sure. I remember distinctly of making a report.

Mr. COLBY.—Perhaps we can expedite matters in this way, by letting this matter go until after the noon recess and let Mr. Ralston examine that in the meantime and I can ask him something along other lines. [151]

The COURT.—Are you through with the examination of the witness other than that?

Mr. COLBY.—No, I have one or two other questions.

Q. Now, I understood you to say in answer to the question asked you by plaintiff's counsel that all of the veins in the Eureka district had a northwesterly direction.

A. Your misunderstanding is getting you into trouble. I said all the veins in the Eureka creek vicinity.

Q. I see. Well, is this Lone Pine claim in the vicinity of the Eureka Creek? A. Yes, sir.

Q. And all those veins that are found in that claim have a northwesterly direction?

(Testimony of James C. Ralston.)

A. You are speaking as of that time of the patent survey?

Q. Only as of that time. You did not intend to convey the information to his Honor that all of the veins in that claim ran northwesterly?

A. No, there is this vein in question here that runs northeasterly. I did not intend to creat a false impression.

Mr. COLBY.—I think that is all with the exception—

Redirect Examination.

(By Mr. GRAY.)

Q. I am going to ask you a question or two about this Exhibit No. 14. Can you say whether or not that was made as a result of a survey made by you up there and examination, [152] or whether it is the work of your office or you as a draftsman. Have you any recollection, I mean, of going up, making an investigation and making that map from any investigation or survey—well, I will withdraw the survey because it shows—

A. As far as the survey is concerned it is a reproduction of the patent survey shown here with a tracing of the Pearl vein, so-called Pearl Surprise vein, and these two alleged cross-veins with a Pearl tunnel—

The COURT.—The question is, how you came to make it.

Mr. GRAY.—Yes, sir; I am trying to find out whether you made it from a survey that you made up there or an examination you made, or how you

(Testimony of James C. Ralston.)

came to make it, if you have any recollection.

A. Well, I confess frankly, I am hazy as to whether this has been made from a definite survey by myself or my assistants for the purpose as shown on this plat.

The COURT.—What is the date of that report?

Mr. GRAY.—This map is March, 1899. Now, I want to find out a few things about this. I want a scale of that, if you will give me the scale. I want to see where these two alleged cross-vein show on this exhibit, where they would be. I was just wondering, Mr. Ralston, if you could tell us what these shields and two picks and Republic, Washington, are on the back. It looks as if we had posters and circulars for the district of Republic camp.

A. It would suggest that.

Q. Well, if you will give me a scale off of that.

A. Yes, sir, I can make it just in a moment now. As I [153] say, there was a period in the history there—

Q. Never mind, now; I want to get this on the map to find out where the two alleged cross-veins come. I will want Mr. Burch to find them.

Mr. COLBY.—I think it is up to your witness. He is responsible for this, and I am not.

Mr. GRAY.—We are only vouching for his correct observations and not incorrect ones, which were made long ago.

Mr. COLBY.—We usually do that in the case of most of our witnesses.

The WITNESS.—There is the scale.

(Testimony of James C. Ralston.)

Mr. GRAY.—Q. Now, the most southerly of those veins which are simply marked cross-veins from the southwest corner of the Pine—

A. Where it is shown as intersecting the west side-line of the Pine is a distance of 230 feet north of the southwest corner of the Pine.

Q. 230 feet you say? A. 230 feet.

The COURT.—Where does it intersect the east line?

A. It intersects the east line at a distance of 600 feet from the southeast corner. [154]

Q. I wish you would come and mark that 230 here. Mark it with red pencil "230."

(Witness marks same as requested.)

Q. Now take the other one.

A. 600. (Marks same.)

Q. That is the point 600 feet out?

A. That is the point 600 feet out.

Q. Now, get me the other vein that crosses the west side-line.

A. That is a distance of about 350. (Marking same.)

The COURT.—For all practical purposes they are about the same distance apart.

A. Yes. That would be 720.

Q. Now, there is still another one that Mr. Colby referred to, the lateral or cross-vein apparently crossing further up or north out of the Lone Pine claim crossing the west side-line? A. Yes.

Q. About where is that?

(Testimony of James C. Ralston.)

A. That is a distance of about 675 feet, say south of the northwest corner.

Q. All right, let us put that on there.

A. (Witness marks same.)

Q. Now, then, Mr. Ralston, have you carefully been over that ground within the last year?

A. Yes, sir.

Q. Is there any vein crossing it at the point marked 230, the west side-line of that Lone Pine claim?

A. None that I have been able to discover. [155]

Q. So that whatever you have mapped or thought in 1899, it is not there to-day and cannot be found?

A. No.

Q. Is that true at the point 350 feet, so far as you are able to observe? A. It is.

Q. Is it also true at the point 675 feet?

A. It is.

Q. That ground is open for observation and examination to-day, is it? I mean there is nothing to prevent seeing those points.

A. I think not. It is on the hillside there, it can be seen. The fact is that the developments within the past year have upset all theories as to this particular vein being a cross-vein. There was a time when I entertained, as I said before, the notion that it was clearly a cross-vein, but the developments in the last year have clearly shown that to be incorrect.

Recross-examination by Mr. COLBY.

Q. These veins which you now are pleased to term alleged cross-veins which appear on your map have

(Testimony of James C. Ralston.)

a course quite substantially parallel to existing veins within the claims, do they not? A. Oh, yes.

Q. And on that small scale map you do not evidently have the idea of exactly representing the exact position of these veins, do you?

A. Well, I cannot say as to that. It is a drawing. It is sought to represent them as nearly accurately as [156] possible.

Q. You had already examined that ground, had you not?

A. Oh, I say I have been over it many times, as I testified.

Q. So that you would not put cross-veins upon a map knowingly intending to misrepresent veins, would you? A. No.

Q. And so according to the best of your belief at that time that represented at least substantially your idea of the position of these veins, did it not?

A. It may. The text of the report accompanying this drawing here—the text may fully explain what I had. I don't know.

Q. I will explain now that I have no idea that this little map accompanies the report. In fact, I am quite sure it does not, because you stated that your report was made in the year 1900, and that corroborates my idea of it, my information.

A. It may have been made for it. I told you I wanted to be quite distinct as to my haziness as to these dates that you are trying to fix in closely.

Q. As far as I know, the report and that particular plat have nothing to do with each other.

(Testimony of James C. Ralston.)

Mr. GRAY.—Would you mind telling us where this plat comes from?

Mr. COLBY.—It came out of the archives of the Lone Pine-Surprise Company and it was originally attached to a report.

Mr. GRAY.—A report of Mr. Ralston's?

Mr. COLBY.—No, another report.

Mr. GRAY.—Somebody else's report? [157]

Mr. COLBY.—Yes. It was merely used—

The COURT.—A great many things have come out of that district besides mineral in the last thirty years.

Mr. COLBY.—We would be glad to let you see this plat if you will agree to let us put it in as evidence.

Mr. GRAY.—I was just wondering if some mining engineer had had Mr. Ralston as a civil engineer prepare a plat for him and attached this plat to his report.

Mr. COLBY.—No, this plat is of such a late date, that this plat was merely used to illustrate the purpose of this district plan here, and had nothing to do with the report and unquestionably was not prepared by the person for the purpose of the report to which I find it attached. He had a number of plats of his own.

Q. Now referring to this discovery here, Mr. Ralston, have you examined that recently?

A. Yes, sir.

Q. And refreshed your memory as to what is there in that vicinity? A. Yes.

Q. What do you find there?

(Testimony of James C. Ralston.)

A. Within the trench?

Q. Within the trench and in that immediate vicinity.

A. Well, I find the same there that I found before, viz., great congeries of small calcite and quartz stringers continuing from a fraction of an inch up to several inches in width. That is a characteristic of the cap of that hill.

Q. And did you find any defined vein running in a northeasterly and southwesterly direction? [158]

A. Small veins can be and I did find running in the direction that I indicated.

Q. Have you surveyed many claims for patent?

A. Oh, I don't know what you mean "many." Relatively no, I don't suppose so. I don't know how many.

Thereupon an adjournment was taken until 2 o'clock P. M. of this 24th day of August, 1920. [159]

August 24, 1920, 2 o'clock P. M.

J. C. RALSTON resumed the stand and testified as follows:

Question. Now, you have had a chance to examine this copy of the report. Are you able to state whether that is a copy of the report which you made.

A. I think it is, without a question. I have read it over and recasting in my mind a little on the matter, I think undoubtedly it is one of the many reports that I wrote of the Republic District, this one in particular of the Lone Pine-Surprise Claim.

Q. Can you fix the date at which you wrote that?

A. I can't fix the date very closely, no.

(Testimony of James C. Ralston.)

COURT.—Is there any date on it?

A. No, there is no date on it. I rather fancy there seems to be some omission here. The continuity approximately does not seem to be entirely complete.

Q. Can you recall any omission which would come into your mind as being in that report?

COURT.—If this report is correct as far as it goes I don't believe we will concern ourselves with omissions.

Mr. COLBY.—The important matter is he mentions no north and south vein as appearing on this claim in the report, they are all cross, or lateral veins, as he calls them. That is the important matter.

A. Now, the fact is that there was a period in the history of that camp when the general tradition was north and south vein with the exception of the two or three as denoted in this report, and they are here called No. 1, No. 2, No. 3 and No. 4. I myself for a long period of time believed after developments were made on this No. 2 as mentioned in this report, that it was a cross-vein, crossing over into the Pearl ground. [160]

Mr. GRAY.—Suppose you just indicate what you mean by No. 2.

A. By No. 2 I mean the vein in controversy in this instance here, the vein shown on Plaintiff's Exhibit No. 2 as being the topmost development of these several drifts.

The COURT.—Where is vein No. 1?

A. It is called Pine No. 2 level, which is shown here 100 ft., and runs over this east side line.

(Testimony of James C. Ralston.)

Mr. GRAY.—The Judge asked of you where No. 1 was, didn't he?

A. Vein No. 1 is shown at the portal of the No. 1 tunnel; No. 2 vein, this one, No. 3 is here and No. 4 the extreme northerly of that series of four veins.

Mr. COLBY.—Q. Now, to get that definitely fixed No. 1 appears at the mouth of tunnel No. 1, No. 1 tunnel crossing it at right angles.

A. About right angles to the direction of the tunnel.

Q. Now, No. 2 is the one in which the main workings appear, and where the main stopping has been done, that is No. 2 vein? A. No. 2 vein is marked.

Q. And the vein has been followed down to the 600 level? A. Yes.

Q. Vein No. 3 runs through what point, about?

A. I take it you refer to that showing at the point marked 152 on No. 1 tunnel.

Q. And that also runs practically at right angles across the direction of the tunnel?

A. Substantially right angles; it varies a little. [161]

Q. And then your No. 4 vein?

The COURT.—The discovery.

A. No, sir; the discovery is over here.

Mr. COLBY.—Q. No. 4 vein?

A. No. 4 vein is the one shown in the vicinity of a point marked 153 in the same tunnel.

Q. Then this follows in the same general direction, so it is approximately parallel to the other three veins that you have named, and described?

(Testimony of James C. Ralston.)

A. Substantially running in a northeasterly and southwesterly direction. Now, as I was saying that I—first it was the period in which the tradition of the camp and the general belief prevailing with at least myself and many others was that these all were series of cross-veins cutting over possibly into the Pearl vein, and this one in controversy. That condition of general belief was that these veins as I say, joined over here.

Mr. COLBY.—I don't want to interrupt, but I don't believe we are particularly interested in general belief in the camp.

The COURT.—There is no question before the Court now.

A. I am trying to explain my own position only. But up to a year ago or thereabouts I had the notion that this vein was a cross-vein until September, about a year ago.

The COURT.—That has been gone into.

A. When I found this development here, I changed my theory on that.

Mr. COLBY.—I would like to introduce this and have it marked as an exhibit. [162]

(The report previously referred to by the witness admitted in evidence without objection and marked Defendant's Exhibit 15.) [163]

Redirect Examination.

(By Mr. GRAY.)

Q. I just want to indicate to the Court how the work was done.

The COURT.—I think the witness has already in-

(Testimony of James C. Ralston.)

dictated what was done, but you may proceed.

Mr. GRAY.—I doubt it, your Honor. Go to that tunnel No. 1 now. I just want to call attention to it so you can see it on the map.

The COURT.—Yes.

Mr. GRAY.—What you call the turn of the level at the intersection of adit 1—adit level is what is now known as Pine No. 1 tunnel? A. It is.

Q. The only tunnel as I understand it that was driven at that time was the No. 1 tunnel?

A. I think there is a piece of tunnel extends over here.

Q. That had not been extended very far?

A. No.

Q. How far had this vein been driven on easterly and westerly, that is what I want to get at, if you can tell either from this report or from your recollection.

A. The report there indicates for a distance of 300 feet all told. I think 100 feet westerly and the balance of the distance over—

Q. 100 feet westerly, you say?

A. That is my recollection.

Q. The balance was over in through across the east side line of the Lone Pine? A. Yes, sir. [164]

Q. And into the Fraction claim?

A. I think even into the Last Chance, all the way across just into the Last Chance.

Q. None of the other workings had been put in in the Pine at that time?

A. Nothing but a winze about 20 feet deep.

(Testimony of John Welty.)

Mr. GRAY.—That is all.

Mr. COLBY.—That is all.

Witness excused. [165]

Testimony of John Welty, for Plaintiff.

JOHN WELTY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. What are your name, residence and occupation?

A. John Welty; Miner's Falls, Washington; occupation, farmer.

Q. Did you ever follow mining?

A. No, not practical mining. I have done prospecting and worked in the mines.

Q. Did you ever prospect in the Republic district?

A. Yes, sir.

Q. Did you locate any claims there?

A. Yes, sir.

Q. What claim? A. The Black Tail.

Q. When did you locate that claim?

A. In February, 1920, I think it was.

Q. Can you remember the date?

A. I did not remember it until I looked it up.

The COURT.—1920?

A. No, pardon me; it was 1896.

Mr. GRAY.—What day in February?

A. February 20, 1896.

Q. Were there any other claims located in that immediate vicinity at that time?

(Testimony of John Welty.)

A. None located in that neighborhood, that I was aware of. [166]

Q. So that your Black Tail was the first claim located in this immediate vicinity? A. Yes, sir.

Q. What claim was next located so far as you know? A. The Quilp.

Q. Whereabouts did that lie?

A. South of the Black Tail.

Q. Then what claims were located?

A. The Lone Pine was located next.

Q. Did you know the locators of the Lone Pine?

A. Yes, sir.

Q. Will you just tell the Court where you made your location on the Black Tail and what you had in the way of a vein and how it ran there?

A. The location notice was right here. That is the discovery, and this cropping cropped out the whole length of the claim from here to here.

Q. That is, as shown on the map? A. Yes, sir.

Q. From the discovery northerly and southerly?

A. Yes, sir; nearly the full length of the claim.

Q. How does that ground lie with reference to this gulch that we have heard about?

A. Well, after you pass this point—

Q. This point is point 875. After you pass that point what does it do?

A. It gradually runs down; I think the deepest part of the gulch is about in here.

Q. As shown here? A. Yes, sir. [167]

Q. What was on the other side of the gulch?

A. Well, there is a prominent ledge cropping out,

(Testimony of John Welty.)

all along here. There is a bluff right here that is standing there to-day, I seen it a few days ago.

Q. Whereabouts? A. It is right here.

Q. That is at the point marked 545?

A. Yes, sir.

Q. Could you see that from your discovery?

A. Yes, sir, plainly.

Q. Looking across the gulch.

A. Right across. The hill slopes down; it is very plainly to be seen; you could easy see the quartz cropping out there.

Q. How did that vein appear to run, Mr. Welty?

A. Well, it shows just as you have it on the map here; it swung around here and went up towards the east like.

Q. At that time was that shown on the surface?

A. Yes, sir; it showed out prominent on the surface.

Q. Tell me now were you present at or about the time that the location was made by Mr. Creasor and Mr. Ryan of the Lone Pine claim? A. Yes, sir.

Q. Will you tell his Honor just what occurred? [168]

A. Well, I had located the Blacktail, February 20th, 1896, and was on my way out to record it. I had been on the reservation all winter, and fed stock up there and trapped during the winter, and I was over there all winter. As soon as I heard it was thrown open, I located that claim, and was on the way out to record it, and I met my brother, so I went back with him again, and then he located

(Testimony of John Welty.)

the Quilp, and then we met Mr. Ryan and Mr. Creasor, and we went in, and we camped together there some days, and they made their locations below, and I invited them up to look at our locations up there, and I told them there was still vacant ground.

Q. Where?

A. Well, this was all vacant here yet, the Blacktail, it was all vacant north.

Q. Where were you working at the time?

A. I wasn't doing much work. I just had a discovery, and digging around with what tools I had. I did not have very many tools to work with, and I told them there was more vacant ground across there; they could see it plainly, see the croppings sticking out, and they went over and made the location over there.

Q. You could see the croppings sticking out, could you? A. Oh, plainly.

Q. At this point 545?

A. See them plainly. I could see them from our discovery. [169]

Q. The top of the hill at the tree?

A. Yes, that was their discovery, here at the tree, where they had their notice posted.

Q. Where were the stakes on that claim laid with reference to the Blacktail—I mean the end-line?

A. The south end is supposed to have joined the Blacktail's north end. It looks all right to me, anyway.

Q. Was the claim located in approximately the

(Testimony of John Welty.)

direction they was patented and is shown upon the exhibit? A. Yes, sir.

Q. Did you see the workings there within a day or two of the making of that location?

A. Yes, sir; I seen them working right at this point here.

Q. That is the point we have already referred to as station 545?

A. Yes, sir; right off of the bluff. There is a bluff right there and it has showed up there as a large lead of quartz cropped out.

Q. Could you see what they were doing there?

A. Oh, they were like ourselves; they had very few tools, and just doing the best they could with what tools they had.

Q. Did they work there off and on at any other time?

A. Well, later on, we went out, you see, when the [170] cold weather set in for a week or so there, and there wasn't a great deal done.

Q. How soon after they went over there and made the location was it that you saw them working there at the point 545?

A. To the best of my recollection it was a day or two, or probably a few days afterwards. Twenty-four years ago—it is awful hard to remember all the little details.

Cross-examination.

(By Mr. COLBY.)

Q. Now, Mr. Welty, you say you put your first discovery on the Blacktail right there?

(Testimony of John Welty.)

A. Yes, sir.

Q. Did you cut down your first discovery tree that you marked, and change your Blacktail notice, the place where it was?

A. Not very far from where it was left when I placed the notice on it.

Q. You moved the claim, however, some?

A. Yes, just a short distance from where the location was made when I recorded it.

Q. You say that you *point* out to Mr. Creasor, Phil Creasor, this outcropping over here from your claim before he located the Lone Pine?

A. Well, we were on the hill together here, just about in the neighborhood of where the location stakes would be, and he could plainly see it across, and you can see it to-day yet. [171]

Q. What day was that?

A. Well, it must have been somewhere about a week later after I had made this location.

Q. That you pointed out to him this cropping over here?

A. Yes, sir; as near as I remember, it must have been. I had gone out and come back.

Q. In the meantime met those folks, you say? You would be certain as to the exact date?

A. No, I could not tell you the exact date. In fact, I don't remember the date that they made their filings, even, but it must have been just about a week later, because I met them going out and met them when I came back.

Q. Now, as a matter of fact, didn't Mr. Creasor make his location here before he talked with you

(Testimony of John Welty.)

about that outcrop over here on the hill?

A. No, I invited him up there. I don't think he did. I don't think he was up there until I had invited him up there.

Q. Where did you invite him?

A. I showed him over the Blacktail, showed him the quartz lead in there, and told him there was vacant ground on the north end of this yet, if he cared to stake it.

Q. Where was it that you had that talk with him? A. Well, at the camp before we went up.

Q. At the camp before you went up? [172]

A. I invited him up there to look over the situation.

Q. Were you with him when he made that Lone Pine location?

A. No, but I was on Blacktail at the time they were staking it.

Q. And you don't recall that date?

A. I acted as a witness for them, but I—

Q. You don't recall that date?

A. No, sir; I can't recall the date. It is too far gone, but I was a witness on the location.

Redirect Examination.

(By Mr. GRAY.)

Q. Mr. Welty, you were a witness on the location notice of the Lone Pine claim? A. Yes, sir.

Recross-examination.

(By Mr. COLBY.)

Q. I want to ask another question. You said that you could see at that time that this ledge here

(Testimony of John Welty.)

swung around on the surface?

Mr. GRAY.—No, sir; he didn't say anything of that kind.

The COURT.—He didn't make any such statement.

Mr. COLBY.—I understood him to say so.

The COURT.—He said he could see the croppings.

Mr. COLBY.—Q. You did not intend to convey the impression that at that time these trenches were there, did you? [173]

A. No, you could not see it here, but here it is quite prominent along in here. There is a bluff there that the quartz cropped out prominently.

Q. The ledge, as far as you could see at that time, had a straight course?

The COURT.—How much could you see of it?

A. Oh, there was probably 100 feet at least that cropped out prominently. You could see plainly from the location over there across the gulch.

Q. If you knew of that ledge there, why didn't you locate it?

A. I will tell you why I didn't locate it. It was something new to me. I had not seen any character of rock of that kind before, and I supposed that if it was anything of any value I had enough, and I wanted to get a lot more interested in there, and the more I got interested the more chance there was to get something out of it. That was my idea.

Q. You were willing to be generous?

(Testimony of E. S. Babb.)

A. I was. I had an opportunity to locate all of it. I was in there first, been there all winter.

Witness excused. [174]

Testimony of E. S. Babb, for Plaintiff.

E. S. BABB, called as a witness on behalf of the plaintiff and after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. Mr. Babb, will you state your name and residence, and occupation?

A. E. S. Babb; residence, Spokane; and my occupation up to a short time ago was a merchant; at the present time I am doing nothing.

Q. Were you ever engaged in mining in Republic?

A. A little.

Q. What properties were you interested in?

A. The Blacktail.

Q. Where did you get your interest in that?

A. I was one of the original locators.

Q. Are you acquainted with Mr. Welty, who has just been on the stand? A. Yes, sir.

Q. Was he one of the locators? A. Yes, sir.

Q. Do you know Mr. Ryan and Mr. Creasor?

A. Yes, sir.

Q. Are you acquainted with the claim known as the Lone Pine claim?

A. Yes, sir; I have been over the ground.

Q. Where did you first become acquainted with that claim? [175]

(Testimony of E. S. Babb.)

A. I should judge about two weeks after the Blacktail was located, maybe a little longer; as far as the date, I could not say exactly.

Q. Had the Lone Pine been located at the time you were first— A. Yes, sir.

Q. Who was up there on that claim?

A. On the Lone Pine?

Q. Yes.

A. Well, I met a good many there; I met Mr. Ryan, Mr. Creasor and lots of others backwards and forwards.

Q. You knew them to be locators of the Lone Pine?

A. Their names was on the location notice.

Q. Were there any—were you over any of the ground with either of them about that time?

A. I could not say as to that.

Q. Did you see them working there at about that time? A. Yes.

Q. Where were they working?

A. They were working across the gulch on the sidehill facing the south of the Lone Pine.

Q. Have you been back to identify that place?

A. Yes.

Q. Have—can you just show the Judge here from the map?

A. Now, where is our location notice of the Blacktail?

Q. Here? [176]

A. I should judge it was right about here some place; there was quite an outcropping there.

The COURT.—Some place on that red line?

(Testimony of E. S. Babb.)

A. On that red line; yes.

Q. There was an outcropping there? A. Yes.

Q. What of?

A. Quartz; what I considered at that time as kind of quartz.

The COURT.—Is the outcropping still there?

Q. Is the cropping still to be seen there?

A. Yes.

Q. You can see them from your discovery?

A. You can see them from our discovery right across there.

The COURT.—There is no use in taking up time on physical facts. If it is still up there the Court can go up there and see it himself.

Mr. GRAY.—I want to make it clear in the record that this particular outcrop was known at that time and being known it was primary.

Q. Were you over to that at any time while they were there? A. Yes, several different times.

Q. And that is the large outcropping that can be seen to-day from the discovery?

A. From the discovery on the Blacktail.

Q. And lies, may I ask you, near the southwest [177] end of what is marked "open stope" there?

A. Yes.

Q. That is the one that they were—

A. That is the one on the sidehill.

Q. That they were working on?

A. That they were working on.

Q. Did you go on up over the ground any?

A. Oh, yes; I have went all over the ground.

Q. At that time?

(Testimony of E. S. Babb.)

A. At that time, before I left there, from the time I went in until I came out. [178]

Q. Did you have any opinion as to the course of the vein there?

A. Well, nothing only that we thought—well, everybody,—at least I did, thought it was an extension of the Blacktail vein.

Q. What was, the place where they were working?

A. No, what we could see from here, the Blacktail would naturally be or considered an extension of the Blacktail ledge.

Q. That is the Lone Pine?

A. The Lone Pine, yes.

Cross-examination.

(By Mr. COLBY.)

Q. You could not see the Blacktail, any indications of the Blacktail were there in this ground at that time, could you?

A. No, there was a gulch that cuts off here.

Q. There was wash on the hillside? A. Yes.

Q. And these exposures that you saw the other day is those cuts, and so on, had not been made at that time?

A. Some of them had, they were working on some of them; yes, sir.

Q. But not down here; they were up on top of the hill, weren't they?

A. No, there has been some later work that has been done up along the sidehill, but those through here [179] was exposed.

(Testimony of E. S. Babb.)

Q. How was that on top of the hill—a big outcrop?

A. Along the side of the hill, not on top of the hill.

Witness excused. [180]

Testimony of W. L. Herrick, for Plaintiff.

W. L. HERRICK, called as a witness on behalf of plaintiff and after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. State your name, residence and occupation.

A. W. L. Herrick; Wallace, Idaho; general occupation, miner; present occupation,—at present I am occupying the position of Assessor of Shoshone County, Idaho.

Q. What experience have you had in mining, and where, and the character of it?

A. I have been mining for about 23 years—23 years in British Columbia. I have performed every operation underground. For the past years I have done no manual labor underground.

Q. Have you prospected any? A. I have.

Q. Developed prospects? A. I have.

Q. Are you engaged in mining on your own account any place now?

A. The only place I have at present, I am operating a lease of the old Standard mine at Mace, Idaho.

Q. Are you familiar with the Republic camps?

(Testimony of W. L. Herrick.)

A. Yes, sir; I worked there in 1899 and 1900.

Q. Where did you work at Republic?

A. At a little prospect beyond the Mountain Lion about a mile and a half from this ground in litigation. [181]

Q. Were you familiar with any of the mines, did you go into any of the mines, and look at them around Republic at that time?

A. Not very much except in the vicinity of where I was working.

Q. Have you examined the Lone Pine and the Blacktail and adjoining properties recently?

A. I have spent five or six days there in the last week.

Q. For what purpose?

A. Familiarizing myself with the properties to testify in this case.

Q. Now, Mr. Herrick, as a practical miner, have you gone there for the purpose of tracing the vein, which we call the Blacktail vein, and which my friend would like to call some other name, Pine No. 2, I believe—

Mr. COLBY.—Which your own men designated as Pine No. 2 until they were hired by you to make an investigation.

Q. (Continuing.) —but for our purpose we will call the Blacktail vein, have you gone there as a practical miner for the purpose of tracing that vein? A. I have.

Q. Have you done so? A. I have.

Q. Will you just tell the Judge where you have

(Testimony of W. L. Herrick.)

traced that vein, and what, as a practical mining man, you have found?

A. Well, I have been over, back and forth, and [182] through the workings, continuously for five or six days in order to have it thoroughly mapped in my own mind. I have been over the surface from—well, I should judge farther than this map shows in the south extension of the Blacktail vein, south of that open stope. I have traced it along the surface over to about the Insurgent or the Fraction—what is called the Fraction line. I have followed it through the various levels and workings wherever possible to get.

Q. Will you just point to that vein as you have followed it on the surface and tell us where it is continuous as you have followed it?

A. Well, starting from this southerly portion in the Blacktail and following it along here, there is faulting along there very plainly evident right in the bare croppings, to an open stope here. I was down through all along through here, these various cuts. While it is not only visible in the cut, but along through here it is visible on the ground in its natural state.

Q. Along here south of T–883?

A. Yes, along there. I would not attempt to put any exact mark, but it is a very distinct plain cropping through there. It does not require a great deal of work to show its course. After you get near the south end-line of the Lone Pine, the hill gets flat along there and the wash is very deep.

(Testimony of W. L. Herrick.)

I could not follow it through there. There is an end-line cut along the Lone Pine, going right along the end-line, [183] there is quite a deep cut, it is pretty hard to hold the ground, and there is quartz in there. There are some large pieces of quartz, and it looks as if the cut had caved in a little, been deeper and better cleaned at one time. I don't think there is any question that that is the apex vein over there. [184]

Q. Of the same vein?

A. Oh, yes, yes. And then there is a cut down through here which was sloughed in pretty badly there; pretty near have to spoil that cut to clean it. Then you get in what is called the end-line tunnel. There is a little filling in there but the vein is good and strong all through, that end-line tunnel. Then you get down about—well, about a little southerly of where a raise comes through as a winze. There this capping is strong and large. Then there is a gap, and you get into this heavy wash in the draw; then you pick it up again as you go out of the wash and follow it continuously around until you get to this open stope. Part of these open stopes are covered up. And then you follow it right around through—open stope here—if I remember rightly, I think the wash covers it right along where it hits the east side-line of the Pine.

Q. As a miner is there any question about that being one continuous, identical vein?

A. I don't see how a person can deny it. I will say, though, that if there had been no development

(Testimony of W. L. Herrick.)

either underground or on the surface, a point on the southwest line to this open stope, say over along through here—

Q. That is down near the Black Tail open stope?

A. Down near the Black Tail open stope—that I would doubt it. In fact, a person would be inclined to think they were different ones.

Q. But with the development as you have seen there, [185] what is your conclusion?

A. I don't think there is any question.

Q. As a miner, what have you to say as to whether or not veins do make turns and bends such as that?

A. We seldom get a vein that don't make a turn.

Q. Have you observed it any place else in the Republic camp?

A. I have noticed the condition in two places where I have worked, a good deal similar to that. We had one quartz vein going down near the Granite that looked a good deal like the Lone Pine-Surprise.

Q. You mean like the Pearl-Surprise?

A. Like the Pearl-Surprise, I should say. And then the one we worked on, it didn't have a curve like that, but it did have a curve along as much as that or little shorter than that.

Q. A little greater? A. Yes, sir.

Q. Have you followed that vein along over through the workings over into the Last Chance?

A. I have been in all the workings it is possible to get into. The most northeasterly working is the 500 level of the Last Chance.

(Testimony of W. L. Herrick.)

Q. Is it of uniform width throughout? A. No.

Q. What did you observe with reference to bulging and pinching of that vein?

A. Why, it is like all veins, Mr. Gray, it pinches and swells. [186]

Q. What was its condition as you followed it to the northeasternmost development as to its pinching down?

A. Why, the last, I should say about 25 feet of the 500 level in the Last Chance, there is just the vein there without much of any quartz filling. The stope pinches right about 25 feet I think from that point.

Q. Coming back now to the vein around the bend, and I particularly refer to from G to G' through that open stope and trench, what did you observe with reference to the bending of the bands of quartz or the bending of the vein?

A. Why, the vein has heavy bends. I took a course in that open stope—I managed to get up in a hole in the 200 level—kind of a dangerous looking stope—and the course going easterly was about north 50 degrees east, and then as you go near the southwesterly end of the stope it changes to about north 30° east. Then as you get right to the end of the open stope and start to go down the cut, it gets very nearly north,—I think about north 10°; then as you go lower from there it is just about due north.

Q. Those strikes you took in the stope itself?

A. I took them with a Brunton compass; yes.

(Testimony of W. L. Herrick.)

Q. Mr. Herrick, did you take any samples?

A. I did.

Q. When did you take them?

A. I think I took—might have taken a few on Saturday of last week and the balance on Sunday of this week.

Q. Will you indicate where they were taken?

A. Yes, sir. [187]

Mr. GRAY.—Mr. Colby, I had, for the convenience of all of us, Mr. Herrick, check where he took the samples, and number them on the map.

A. I took about 14 samples, I think. I started just south of the open stope on the property and went down various places up to here, then ending at the end-line tunnel.

Q. These samples are *number* from 2876 to 2883?

A. Yes, sir.

Q. What did you do with them?

A. I took them myself, sacked them, expressed them from Republic to Spokane.

Q. To whom?

A. To myself at the Davenport Hotel. And one of your engineers—I delivered them to him, and he took them over to Fassett.

Q. Who was that man?

A. I think Mr. Burg handled them.

Q. Did you get a report of the assays?

A. Yes, sir.

Q. Have you that report here? A. Yes, sir.

Mr. GRAY.—I will call the assayer, if you wish.

Mr. COLBY.—No, sir; it is not necessary.

(Testimony of W. L. Herrick.)

Q. May I have those?

A. Those include more than I have described.

Q. Let us get this clearly. Samples 2876 to 2883 are shown upon Exhibit 1. [188]

A. Yes, sir.

Q. Show us the points where they were taken.

A. Yes, sir.

Q. Where were the other samples taken?

A. They were all underground.

Q. Did you indicate on the map?

A. I think it is on the 10-foot detail.

Q. Those were samples 2884 to 2889?

A. Yes, sir. [189]

Q. And the exhibit which I have is the result of those assays. How did you take the samples?

A. I took them right across the vein probably in a channel about a foot wide.

Q. Now, I want to direct your attention particularly to the samples taken at the end-line of the Pine claim in this trench, samples 2883 and 2882.

A. Yes, sir.

Q. 2883 shows a value of $13.14. A. Yes, sir.

Q. That is the one taken right here at the end-line?

A. It was taken right at the breast, on the footwall side where there was a round shot out there just the day before.

Q. And 2882?

A. Taken 14 feet back from that on the footwall side of that vein.

Q. Shows a value of $11.23? A. Yes, sir.

(Testimony of W. L. Herrick.)

Q. Gold and silver?

Mr. GRAY.—I think your Honor can gather the others from a comparison of the map.

The COURT.—Yes.

Mr. GRAY.—Oh, there was one other. Just point out where sample 2889 was taken.

A. 2889 was taken right at the breast of what is called the winze level. It is where most of those interested in the case refer to breaking into the sand and gouge, where there has been surface errosion, and just the last day we were able to get spiled in there and catch it up so we could see the vein in place. [190]

Q. That is solid rock? A. Yes, sir.

Q. You got a value of $4.78 there?

A. Yes, sir.

Q. Was that vein in place there when you saw it last?

A. Oh, my, yes. It is very solid—I cannot tell how large the vein is, but you can see it is at least more than a foot wide anyway.

Q. Did you bring any samples with you that you took at that place?

A. Yes, sir; I brought three chunks more so that the rest could see what was there.

Q. Will you produce those? You have those here? A. Yes, sir.

Q. In this sack. I am going to ask that they be marked as Exhibit No. 17. Will you just exhibit these now to his Honor and show where they were taken from and how? A. This one shows—

(Testimony of W. L. Herrick.)

Q. If we are going to separately describe them—

The COURT.—They were all taken from the same place, were they?

A. All taken from the same place.

Mr. GRAY.—All right, go ahead and describe them.

Q. Except this piece that shows the sand and mud from the waters coming down. In fact, it is washed off the hanging over the quartz; that is why it shows up so plainly.

Q. That is this side here? A. Yes, sir.

Q. Right on top of that is the sand. [191]

A. That is the hanging-wall of the quartz.

Q. And that is the quartz of that vein.

A. That is the quartz of that vein. It is the same as the sample that I took, 2889. I suppose it will run about the same, although there was shipped more of it for the sample itself.

Q. That vein is in place there.

A. There is no question about that.

Q. On this detail map that would extend just a little bit down into the bottom there as shown?

A. Yes, sir; it is just beyond—you see there were two sets of timber put in there and spiled over the timber in order to catch this soft gouge. The vein comes right down like that square across the drift in a northerly and southerly course.

Q. Dipping southeasterly?

A. Dipping southeasterly.

Mr. GRAY.—You may examine. I want to offer all of these several exhibits.

(Testimony of W. L. Herrick.)

Mr. COLBY.—Are you through with the witness?

Mr. GRAY.—Yes, sir.

Cross-examination.

(By Mr. COLBY.)

Q. Mr. Herrick, I understood you to say that there was a good vein at the end of this working in here. In the first place let us take this while we are here. What is showing in this tunnel that runs in past the gulch winze.

A. On beyond there? [192]

Q. Yes, sir.

A. There is a little split there and they got off the vein, or apparently did and it seems to come through this wall here, because a shot—that little dotted line shows a shot was put in there and showed up the quartz there again. Now, there is evidently some faulting, because it is not a well-defined vein through there at all. In fact, I don't think they are on the vein.

The COURT.—But where is that indicated on the surface map?

Mr. COLBY.—It does not show on the surface map. It is right in here. Here it is on the composite.

A. Well, it would come about under the end of the end-line tunnel.

Q. Now, taking the end-line tunnel, what do you find in that as you approach the end-line?

A. The vein in my judgment is mostly in the footwall there. I picked in probably a foot into the footwall further than the shots there, and that is

(Testimony of W. L. Herrick.)

where I got this ore that ran pretty well. Why I did that was that it had the appearance of vein matter, the pyrites of iron and rather typical vein structure in there and not like country structure with something shot through it. There is no question in my mind but what the vein is in the footwall of that inland tunnel.

Q. Not in the tunnel itself?

A. It is in the tunnel itself in the way of faults, but what I was looking for was a continuous vein in place, a well-defined vein.

Q. There is a fault shown in the tunnel there. [193]

A. Yes, sir; there are several of them, I think, little faults. There is one right near the mouth of that tunnel.

Q. Do you recall the last showing of quartz toward the end of that tunnel?

A. Yes, sir; I think that is where they got off there. Right out near the mouth of that tunnel there is a cross-fault in there, and I think that is where that vein is thrown into the fault. I think that is why they kept going there and got off the best part of it.

Q. Now, in the course of your inspection of the ground, and you were there only five or six days, I understand, altogether? A. Yes, sir.

Q. Was your attention called to a little winze right off the Pine 200 level at the fault just to the northwest of Station 320? A. Yes, sir.

Q. And what did you think of the enclosure that you saw in the face of that winze?

(Testimony of W. L. Herrick.)

A. Pretty good quartz.

Q. What direction was that going in.

A. A general northerly course.

Q. Wasn't it northwesterly?

A. Well, it might be. I mean within 20 degrees when I say northerly.

Q. The direction is substantially indicated by this red line crossing through the point 320.

A. Approximately yes.

Q. What was the size of that showing? [194]

A. I made no notes. According to my recollection it must have been a foot of quartz in it.

Q. And vein material, was that wider?

A. Yes, sir.

Q. That lines up substantially, doesn't it, with other exposures that you have here running in a northwest direction?

A. Yes, sir; but there are thousands—no, I won't say thousands, but hundreds of them that line up, that is, you go in an east and west cross cut, you find *e*numerable veins running northwest and southeast.

Q. Running in which direction?

A. Northerly and southerly.

Q. Let us take Pearl No. 2 tunnel, where do you find northwest and southeast veins innumerable?

A. I would not want to have you try to pin me down because I have no notes to substantiate it. You can see red lines shooting off here.

Q. Point out those that are going in a northwest direction. A. Well, they swing in all ways here.

(Testimony of W. L. Herrick.)

Q. Aren't they almost invariably northeast and parallel to the levels here shown on this Exhibit No. 2?

A. Possibly the greater part of them are. I think that is probably true. As you go in this Pine, that is the way you find most of these little stringers, are the east and west stringers. I don't think that has any influence on the north and south vein. [195]

Q. No, but you say that there are innumerable northwest and southeast veins through there, a thousand of them. I want you to point out some of them.

A. Perhaps you want me to be too exact. If I went in this tunnel and found them striking this way and that way, all around, I would say there were innumerable fissuring showing quartz going through there, which I do not consider of any value.

Q. Don't you think in view of the contentions and various comparisons in this case, that if they found any of those northwest and southeast ones that they would put them on the map there?

A. I just want to explain one thing here, Mr. Colby. This tunnel here was the one I only had in mind more going north and south, in fact, the Pearl tunnel, I just made one quick trip in it, but in this Blacktail tunnel you will find any number of north and south fissures.

Q. Take this Pine 200 level; do you find innumerable northwest and southeast veins in that?

A. I did not pay a great deal of attention to that upon No. 2. I always paid more attention to going

(Testimony of W. L. Herrick.)

in and following the vein. I don't think I paid much attention to it at all.

Q. Well, if there were thousands of them in the ground there.

A. I would like to say before you go much further that I did not do this as a geologist at all, just as a practical miner getting the course and strike of the vein.

Q. I mean, when you made the statement that there [196] were thousands of veins—

A. This will show you down here that there are any number of them, and undoubtedly a great many more, that are not worth while marking, minute fissures.

Q. Let us pick out those. A. There is one.

Q. Is that northeast and southwest?

A. It crosses that from one side to the other, Mr. Colby. Here is one going away off almost east and west. Here is one going that way. Here is another one almost straight off, and I don't think that is worth while paying any attention to, those small quartz stringers.

Q. Get back to the original claim; my original question was, didn't it surprise you to see that vein going off to the northwest, a substantial vein there, with a foot of quartz with more and greater thickness of vein matter and you said, "No, because there were thousands of those," and I want you to point out another one.

A. You asked me why I was not surprised?

Q. Yes, sir.

A. Because right about here is where a good part

(Testimony of W. L. Herrick.)

of the bending starts in there, and I considered that would be just like bending wood or something like that, you will get the fractures splitting off from the bend. I didn't consider it of any value or I thought it would be found off some place else. It was never followed and evidently did not amount to much.

Q. You say you did not take any notes of this?

A. No. [197]

Q. Was your attention attracted to these pits that have been marked in pencil on Exhibit No. 4?

A. Yes, sir, I saw all of them.

Q. And what did you find in there?

A. I found quartz very strong here and getting weaker as it went northeast until it was rather weak down in that sand-pit there.

Q. Was all the quartz exposed in that sand-pit?

A. That is hard to say.

Q. Wasn't it caving ground there, coming in, and didn't the men have great difficulty in holding the ground? A. It is all soft sand there.

Q. For that reason you would not be sure of the width of the quartz in that portion?

A. It gave one that appearance. It was petering out as it went to the northeast.

Q. That is a good substantial vein there as shown in these first three cuts to the south?

A. Yes, sir.

Q. What is its general strike as compared with what you call the Blacktail vein on these various levels?

(Testimony of W. L. Herrick.)

A. It runs a little more northerly than the main workings.

Q. It is substantially parallel, isn't it?

A. It looked to me as though it might be about 20 degrees off.

Q. Project your pointer there through those cuts so it will reach the levels. There is not a great variation there. [198]

A. As you go down, of course, there is more variation. Up on the top there would be probably 20 degrees variation.

Q. Did you notice the vein that has been referred to here as the No. 4 vein?

A. That stope in the Pearl tunnel?

Q. Yes, sir. A. I was in there.

Q. Did you see any mining in there, any evidences of mining?

A. Yes, sir; a little stope in there, an underhand stope.

Q. Did that impress you as being a vein of importance.

A. Certainly it was a vein; commercial ore in it.

Q. You did not see any turning of that vein?

A. There has not been enough work done in it to determine it.

Q. What would be your candid view of that vein?

A. What do I think it might do?

Q. Yes, sir.

A. I think it will pinch out.

Q. As it comes in a westerly direction?

A. I think this vein probably might have changed

(Testimony of W. L. Herrick.)

some in there, if the fracturing had not been continous around here.

Q. And the cause of that fracturing you think that it continued on in a right angle direction or nearly a right angle direction?

A. That I think this vein did?

Q. Yes, sir. [199] A. I know it did.

Q. Did you see any other vein in the ground here in controversy? A. Yes, sir.

Q. What?

A. There is a vein right at the mouth of the Pine No. 1 tunnel. Then there is the Blacktail Lone Pine vein, the main ore-bearing vein. Then here are these various little ones, running off here on which they drifted but found nothing to amount to anything.

Q. Crossing the tunnel substantially at right angles.

A. Yes, sir. This, of course, is in the other tunnel. I guess this is the one that is in the No.1 tunnel.

Q. Yes, sir, that is on the same level. I think that is all.

Mr. GRAY.—That is all.

Witness excused. [200]

Testimony of Roy Wethered, for Plaintiff.

ROY WETHERED, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. Will you state your name, residence and occupation?

A. Roy Wethered; mining engineer; residence at Wallace, Idaho.

Q. Where were you educated Mr. Wethered, and what experience have you had?

A. I graduated as a mining engineer from the University of Idaho, and since then, which was in 1905, I have practiced my profession in Idaho, Washington, Montana and Mexico and British Columbia.

Q. Are you familiar with the veins of the Republic district? A. I am.

Q. In the course of your practice have you had much development work, development of prospects and work in producing mines? A. I have.

Q. How long have you been acquainted with the Lone Pine, Black Tail, Last Chance and Fraction claims, that territory in question?

A. About four years.

Q. What position do you occupy at the present time?

A. I have charge of the engineering department of the Tamarack & Custer Consolidated Mining Company, doing engineering work for the Tamarack

(Testimony of Roy Wethered.)

& Custer and Hercules, Northport [201] Smelting & Refining Company and other small properties.

Q. Now, let us go back to the time this litigation started and I want you to indicate to his Honor, what work was done at that time, or to get at it a little better, what work has been done since the litigation started and by whom? First, let us get the work which has been done by the plaintiff company since the litigation started. [202]

A. After a trench was dug on the western extremity of the Lone Pine vein to see where this vein extended, this trench disclosed the vein—the vein was disclosed in a westerly direction and then turning southerly where it became the Black Tail vein. Thus the Lone Pine and Black Tail veins were one and the same vein.

Q. That is the work Mr. Day described which was done before the suit started?

A. That was work done before the suit started.

Mr. COLBY.—That was done for litigation purposes?

Mr. GRAY.—No, it was not. Mr. Day testified it was not. You may ask Mr. Weatherhead here.

The COURT.—The question is what work was done since the litigation.

Mr. GRAY.—Since the litigation started what work was done by the plaintiff?

A. On the surface trench at the south end, called the end-line tunnel, that has been done since the litigation started.

Q. Now, then, any other surface work? A. No.

(Testimony of Roy Wethered.)

Q. Now, go to the ten-foot detail map and I think you can point out there what work also has been done.

A. In the neighorhood of Station 330 the drift has been extended on to the south to 331, through 334 on over to 340, into the south, also opened out to the surface to the west of 340. A winze was dug in the neighborhood of 340 just to the northwest and some drifting was done below the winze level.

Q. From the bottom? A. Yes. [203]

Q. What is the orange marking shown on that working intended to represent?

A. That represents the sand and gravel in the gulch.

Q. Were you present at any time when this most westerly of the workings on the winze level was open? A. Yes, sir.

Q. What was in there?

A. I was there at the time when this part caved through and just before it caved through. I was in there and saw quartz and vein material.

Q. Where was that?

A. At a point here about—oh 15 feet from 349.

Q. On which side? A. On the west side.

Q. Now, why did you run the winze level around in the manner in which you did?

A. Owing to running into this soft material and an open fissure and it caved on us and then we ran around here in order to get around the gulch.

Q. To the point where Mr. Herrick took sample 289? A. Yes.

(Testimony of Roy Wethered.)

Q. You went in then about midway between 349 and the northerly end?

A. Yes, and struck sand and gravel at that point.

Q. Now, then, any other litigation work performed, as far as you know, by the plaintiff company?

A. I don't recall anything particular except there was a little on the 300 level.

Q. At what station?

A. At Station 343. There is a drift a short distance [204] there and a raise and a little work was done from—well, it extends from 332 to the face.

Q. Now, coming back to the surface. What surface work has been done since this case started, on behalf of the defendant?

A. They have done considerable trenching in the vicinity of the center of the claim easterly and westerly from the discovery cut by patent notes. [205]

A. I think they started early in February and finished up in the latter part of April.

Q. Just point out to his Honor how they worked there, how they undertook the development of those stringers that have been testified to in that vicinity.

A. They dug a trench that disclosed a stringer going westerly from the discovery cut for 50 or 60 feet, and then turned southerly and then again westerly, where several stringers branched and cut off on a north and south stringer. And then another trench, at T–811 was dug, and disclosed another stringer, which came in from the northerly side of the trench and passed along the westerly and entered

(Testimony of Roy Wethered.)

another trench, T–810, and was lost, and another stringer was picked up and followed southerly and was lost in the wash. And then trench T–807, showed a quartz stringer running southerly, and then several other trenches there. T–808 showed a small—

Q. Had they in this first work, following down here and struggling around from trench to trench, followed any continuous stringer? A. No, sir.

Q. Now, their next effort was where?

A. They did some trenching still further north and westerly and disclosed a small stringer in T–808 and the same one in T–805, and in their cuts T–804, 802, and 801 did not disclose any.

Q. Then what else? [206]

A. Then on the east side of the claim they put a trench over there near Station 520 that disclosed a few small stringers. They also dug trench T–828 and disclosed a small stringer, and another one T–827, which disclosed a stringer that has a strike running further to the north, that is, that would carry it further to the north.

Q. Was this also a trench?

A. Yes, there is a trench in there at T–824, which disclosed a couple of stringers.

Q. Then what did they do?

A, I think they put in a trench 823, that disclosed some small stringers.

Q. Now, coming westerly again, when did they run these other pieces of work and trenches following other pieces of stringers?

A. That was done very recently, this month.

(Testimony of Roy Wethered.)

Q. This month? A. Yes, sir.

Q. Which one did they run first?

A. I don't know. I was not up there at the time, but they ran these two here.

Q. They are run on different stringers, are they?

A. Yes, sir.

Q. The northerly one on a different one than the southerly one? A. Yes.

Q. What becomes of that stringer that they run [207] out in the northern trench there?

A. They lost it and then ran down another trench, and it spread out in numerous stringers. And then later they ran another trench from this end,—

The COURT.—I think this would probably come in more particularly in rebuttal, wouldn't it?

Mr. GRAY.—I am simply going into it. I am not going to seriously combat, as Mr. Searls did not, that they have followed from one stringer to another over there, but I am going in to show just the character of these many little fractures, and I am really through with it now, but would rather finish with it.

Q. The last work they did was what?

A. From T–800 up to and joining one of these numerous stringers at "E."

Q. Where else have they done any work under ground?

A. They did some work on the 200 level near Station 331.

Q. That is the working which runs southerly there? A. Yes, sir.

Q. May I ask you now, Mr. Wethered, if you have

(Testimony of Roy Wethered.)

examined the vein in that working from 331½ south? A. I have.

Q. What is the strike of the vein?

A. It goes southerly and then turns and goes [208] southeasterly to the face of the drift.

Q. In your judgment, is that the same vein which is not numbered, what will we call that—just northwest of the gulch winze?

A. Near the gulch winze north, it is the same vein in my belief.

Q. Have you traced this vein on the surface from the Blacktail discovery up into the Lone Pine and out through the east side-line of the Lone Pine claim?

A. I have. The vein can be followed continuously with the exception of two or three places.

Q. In your judgment, what is the fact as to that being an identical and continuous vein from the Blacktail discovery up through the south end-line of the Lone Pine claim and out of its east side-line as depicted upon the Exhibit No. 1?

A. I believe it to be the same vein.

Q. I wanted to go back to one other piece of work that was done in the course of litigation in tunnel No. 1. Was there any work done there in Pine tunnel No. 1?

A. Yes. Pine tunnel No. 1 they did some work near Station No. 152.

Q. What work was it? Drifts along those little stringers? A. They ran some drifts; yes.

Q. I will ask you also who did the work from 326 westerly, if you know? [209]

(Testimony of Roy Wethered.)

A. That was done by the Last Chance.

Q. Now, without going into detail, the question which I have gone over with the other witness as to the continuity of this vein, do you, as a mining engineer, observe that vein and the banding of the quartz in the vein bending as is shown in the exhibits?

A. I do.

Q. Is that unusual, Mr. Wethered, in your experience, for a vein to act in that manner?

A. No, sir; it is not unusual.

Q. In the end-line tunnel there is a truss. Do you find this vein, or part of it, exposed there, crossing the south line of the Lone Pine claim?

A. I do. It can be seen in that tunnel in that direction.

Q. And is it continuous, in your judgment, from there on up, as shown? A. It is.

Q. Will you point to Station 331?

A. Just at that point.

Mr. GRAY.—That is the same one that is shown on this smaller map here.

The COURT.—Yes.

Q. How did you come to leave the quartz there that is shown in the southerly working and follow off to the east?

A. In drifting here we ran into this open fissure, filled with sand and gravel, and the quartz had been [210] removed slightly. At the foot it was covered over with the sand and gravel, and we naturally thought that it had been washed away, and we then drifted through the sand and gravel and picked it up on the other side.

(Testimony of Roy Wethered.)

Q. Later the work at the two points called cave opening and sand winze disclosed the vein on a little below that level, did it? A. Yes, sir.

Q. Is that the same vein as shown in the working from 331½ south, in that southerly drift?

A. Yes, sir.

Q. Were you at the property when this crosscut on the 400 southwesterly was driven?

A. I visited the property about that time.

Q. Did you observe that as it was freshly made?

A. I did.

Q. Did that disclose any vein of any size or character after you left the Blacktail vein at a point about 40 feet south of one and 50 feet southerly of Station 179?

A. It disclosed nothing but small stringers.

Q. It did not follow any vein? A. It did not.

Q. What is the fact as to their being a large number of little veinlets and stringers of quartz to be found close upon the surface and underground in this territory? [211]

A. They are quite numerous.

Q. Have you traced this vein, Mr. Colby, I believe that you have admitted that it is continuous downward into the Last Chance?

Mr. COLBY.—Yes, more on its strike than on its dip. [212]

Cross-examination.

(By Mr. COLBY.)

Q. Mr. Wethered, I believe you stated that you were in the employ of the plaintiff. A. I did.

(Testimony of Roy Wethered.)

Q. And have been for some time? A. Yes.

Q. Is this a common occurrence, that a vein should turn almost at right angles, as is the case here, in your experience? A. It does often so.

Q. Where have you seen other examples?

A. In the Coeur d'Alenes.

Q. What mines for instance?

A. Tamarack and Custer.

Q. In the Tamarack and Custer? A. Yes, sir.

Q. And they have right angle turns in veins and veins extend on each side for a considerable distance?

A. A considerable distance, yes.

Q. How great a distance?

A. I don't recall the exact distance; but as far as this distance that has been opened up here.

Q. Equivalent to this? A. Yes.

Q. Now, at this point that you testified to here, I believe in the vicinity of 331, you said you had quartz following along there to 331½, I believe this new point is marked. A. Yes. [213]

Q. Why is it that you turn with your working decidedly to the left and follow on a southeast course, if you had quartz in the working that you were following?

A. As I explained, we ran into these boulders and gravel and the quartz right at the bottom had been moved, I suppose, by the water and there was sand and gravel lying over it and it looked like the end of the vein at that point—it had been removed—and then we continued the drift as indicated.

Q. Isn't it a fact that there is continuous quartz along there as shown by this Exhibit 4 beyond 331?

(Testimony of Roy Wethered.)

A. Yes, sir.

Q. Well, now, why didn't you follow that quartz instead of turning to the left?

A. Because at the bottom of the drift is where the quartz is out and the sand and gravel lying over that didn't allow us to see it.

Q. Didn't interest you to follow it?

Mr. GRAY.—No, that isn't what he said.

Mr. COLBY.—In a right hand direction.

A. We could have followed the quartz if we had seen it.

Q. The quartz appears here in the little workings we ran, out beyond the little workings 331½ to the south, doesn't it?

A. It runs to the south and southeast.

Q. And you overlooked that quartz then and went on to the left. A. We missed it; yes, sir.

Q. Now, out here at the end of this tunnel which runs in past the gulch winze, what sort of showing did you have? [214]

A. We have quartz continuously exposed to and past Station 342.

Q. And there you are off the vein beyond that you think or has the vein ceased?

A. The vein—there are some gouge walls there. It may be that the vein is on either side or the other; possibly on this side.

Q. May have been thrown by this fault—the gouge walls indicate faulting, do they not? A. Yes, sir.

Q. And of course unless you had something to go by you couldn't tell?

(No answer.)

(Testimony of Roy Wethered.)

Q. Didn't it strike you as a little peculiar with such a massive vein as you have coming to the southwest through this working there that there should be such a weak vein beyond that you had such difficulty in following, finding it; didn't that occur to you as rather strange?

A. Well, it was a little smaller, but I didn't know but what it was as another part of that vein. It is smaller in other places.

Q. You say these cuts over here that are down in the left hand side, put in in pencil, with the red pencil markings crossing them—you have seen those cuts have you? A. Yes, sir; I have seen those.

Q. What is exposed in those cuts?

A. There is quartz exposed in them.

Q. There is a considerable vein there, isn't there?

A. In some of the cuts the quartz is possibly 3 feet wide; but in this cut, why, it is apparently quite narrow. [215]

Q. That is the one that is driven fully underneath the surface on an incline? That is the one to the northeast of the 4?

A. Yes, the most northerly cut.

Q. Now, the condition of the ground is a caving condition, isn't it, difficult one to hold?

A. It is drifted there; yes.

Q. And the workmen had great difficulty in keeping the wash from coming in?

A. Well, they put in some timbers there, pretty small timbers; I don't think they had much difficulty.

(Testimony of Roy Wethered.)

Q. And in your estimation was all the quartz shown there that exists in that vicinity connected with that particular fissure?

A. That stringer looked like it was all the quartz.

Q. You think that was all? A. Yes.

Q. Nothing covered up by the wash or beyond the wash? A. I could not see any.

Q. If it was there you did not see it?

A. I did not see it.

Q. Now, if that is such a clear turn of the vein here as you testified to running down the surface cuts, why is it that you could not turn that in on your other levels, say the 400 or the 600?

A. Probably we can.

Q. And you made no attempt to turn around at those places and follow that curvature to the south?

A. That is quite a low grade ore there, and it would not justify the work in that vicinity. [216]

Q. Where would you have to go in all probability to reach where the vein should be?

A. Well, to get that direction they might have to extend around some few hundred feet.

Q. Some few hundred feet, you think? A. Yes.

Q. That is the 500?

A. It might extend 100 feet.

Q. Leaving out the 500?

A. It might gradually turn in that distance, but it would have to go a little before the turn would be completed.

Q. How far on the 400 would you have to go before you would reach a turn?

(Testimony of Roy Wethered.)

A. Well, you might not have to go very far.

Q. If there was a turn there, it would have taken very little work to have shown it, wouldn't it?

A. Well, I don't know, it might take quite a little work, I could not say as to that.

Q. On the third level here, there at 343 you have a working that turns sharply to the east, nearly due east and west from 343. Do you consider that at the old turn? A. There is a branch there.

Q. Is that out of the Black Tail vein going south?

A. I am not so sure of that. It is possible that the Black Tail lays a little bit farther in the footwall here.

Q. You did not get it in that working, did you, turning to the south so you could see it clearly?

A. There are some small stringers there, but they are not very large.

Q. That is all you get, some small stringers, where you [217] have a great big vein back here that is several feet wide?

A. Well, the vein there is not so wide as back in this vicinity.

Q. Well, it is a strong, persistent vein, isn't it?

A. It is persistent, yes.

Q. Now, did you ever know of or see an indication of a little winze that is on the 200 level right to the northwest of point 320?

A. There is a hole there with water in it. I was never down in it.

Q. And you haven't any indication there of a hole on this map. Were you responsible for this map?

(Testimony of Roy Wethered.)

A. No, sir; I did not make the survey.

Q. You don't know whether or not, then, any vein went down in that hole?

A. No, I was never down in it.

Q. Did you see any indication of a vein in the stub immediately beyond, in the face of that stub that goes northwest?

A. There is a little quartz in there.

Q. What would you call a little?

A. Well, it is possibly a foot wide.

Q. There is as much quartz as you have in any of your workings going south, isn't there?

A. Oh, no.

Q. There is in some places.

A. In some places it is nearly as wide.

Q. I believe that you said that you could find veins running in any direction with quartz occurring in this country? [218]

A. Well, there are numerous quartz stringers up there.

Q. Do you find many northwest and southeast stringers?

A. There are some exposed, but I suppose probably by uncovering you would find many more.

Q. If you ran a crosscut to the east you would cut through northeast southwest stringers, wouldn't you, if they existed? A. You might crosscut some.

Q. I call your attention to a crosscut here from 190 to 191 and ask you if you find quartz stringers running through that?

A. Well, there are not many exposed there.

(Testimony of Roy Wethered.)

Q. They would be on this map, wouldn't they, if they showed there plainly observable?

A. Probably.

The COURT.—This witness cannot tell what would be on the map.

Q. Didn't you have anything to do with the directions of putting on these various exposures of faults, veins, and so on?

A. I had something to do with part of it, yes.

The COURT.—I suppose counsel will concede that it shows all of the ore that was discovered, practically.

Mr. GRAY.—I don't want to concede that it shows all of the stringers that are in there, because, as Mr. Searles says, there are hundreds of them, and it does not show all of them. But anything that is particular.

Mr. COLBY.—Except I think these crosscuts that run east and west and northeasterly, it would not run the hundreds and thousands that you have been testifying to. [219]

Mr. GRAY.—His Honor can go up there and see them. You can get them there from pieces of rock as big as your hand.

Mr. COLBY.—Are they comparable to the ones you put on the map here?

Mr. GRAY.—Oh, no; they only put on the map the larger ones.

Mr. COLBY.—You find that in all mineralized country, stringers running in all directions, from infinitesimal up to the size that has been pointed out

(Testimony of Roy Wethered.)

there, of course. But when we come here we have those things which are plainly observable put on the maps. Do you know when this suit was filed, when this action was commenced?

A. I don't know exactly. It was some time a year ago.

Q. About a year ago? And you had been doing some work in preparation for this, hadn't you, at that time?

A. Well, yes we had done some work up there for the reason for starting the action.

Q. And you had, of course, the year that followed, in which to make these developments. I think you said that it was common to find this right and lg tuen in veins, and you gave as an instance this Tamarack and Custer mine as one case where you had found such an example. Can you give me another example in some other mines?

A. There is an example right there.

Q. I mean some other mine.

A. There are instances in the San Poil in the same district.

Q. Where a vein turns at right angles and runs for a [220] considerable distance?

A. For quite a distance; yes.

Q. How far? A. I don't know.

Q. Do you know that of your own knowledge?

A. Yes, sir.

Q. Have you seen it? A. I have.

Q. Can you give another instance?

(Testimony of J. E. Berg.)

A. Outside of this property I don't recall any in particular, in this district.

Witness excused. [221]

Testimony of J. E. Berg, for Plaintiff.

J. E. BERG, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. GRAY.

Q. Just state your name, residence and occupation, Mr. Berg.

A. J. E. Berg; Wallace; mine surveyor and engineer.

Q. Did you receive the samples from Mr. Herrick that he took and has testified to and deliver them yourself to an assayer? A. I did.

Q. Did you make the survey to ascertain the precise point at which the footwall, the northern wall of of the Black Tail vein passes out of the east side-line of the Lone Pnie claim?

A. I did.

Mr. GRAY.—I might inquire of counsel, is there any question about this point of 589 feet?

Mr. COLBY.—I don't think there is any controversy over that. That is the point Mr. Searles testified to.

Mr. GRAY.—Yes. Is that the point Mr. Searles testified to?

A. He testified to point A.

Q. And that is how many feet from the south?

A. 589 feet.

(Testimony of William A. Simpkins.)

Q. 589 feet from the southeast corner?

A. Yes, sir.

Witness excused. [222]

Testimony of William A. Simpkins, for Plaintiff.

WILLIAM A. SIMPKINS, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. GRAY.

Q. Will you state your name, residence and occupation?

A. William A. Simpkins; San Francisco, and I follow the profession of mining engineering.

Q. Where were you educated for your profession, and what experience, and in what capacities?

A. Educated at the University of Michigan, and left there in 1905. Since that time I have followed mining engineering in its various capacities continuously with the exception of about 19 months during 1918 and 1919, up to the present time.

Q. During that time have you had charge of the development of mines and the operation of mines?

A. I have.

Q. Are you familiar with the properties in controversy here situated near Republic, Washington.

A. I am familiar with them.

Q. When did you first examine them recently?

A. In April of the present year.

Q. And you have been there since that time?

A. I have been there on three occasions.

Q. Will you now state in your own way what you observed with reference to those properties and the

(Testimony of William A. Simpkins.)

presence therein of any vein or veins, the position of those veins, their strike and dip, and their relation to the lines of the claims, using any exhibits that are in evidence or any others that [223] you desire to introduce in connection with your testimony?

A. Referring to Plaintiff's Exhibit No. 1, I have visited the Black Tail claim and observed the vein in that claim from about the vicinity of the discovery, the open stope, followed this vein on its outcrop northerly and northwesterly direction to about Station T–875, where the vein is covered with wash. The next point where the vein is observable is in the trench at the south end-line of the Lone Pine claim. From this point it is developed by a small tunnel and a series of trenches to a point just north of Station 557 where it is covered by wash. From there it is again observed in a cut or trench on the north side of the gulch just south of 552, where it is continuously observed around a bend, where the bending of the quartz is plainly observable to the open stopes, and thence northeasterly to the side-line of the Lone Pine claim. There is a little pit right near the side-line where it is covered with wash, but it can be seen underground. The characteristic feature of this vein is its crooked strike and the number of branches which it has. These run in various directions from the foot and hanging wall, and are usually much larger where they leave the vein than at a little distance. Most of them die out in a short distance or at least disappear under the wash. These branches are both in the foot and the hanging. In the center of

(Testimony of William A. Simpkins.)

the claim there are numerous streaks and stringers of quartz running in almost every direction, some of them of fairly good size to be called veins. These have been opened by a series of trenches in a general northeasterly and southwesterly direction. They expose the vein from the discovery cut [224] about the center of the claim. Across the westerly side-line they have been followed continuously, and across the easterly side-line with a few exceptions where they simply jump from one stringer to another. The vein is opened—there is another vein which is exposed near the southwesterly corner of the claim. This vein shows a good strong body of quartz, and is open in a series of trenches and a little tunnel. This is a big vein near the side-line. It gradually diminishes as it runs to the northeast and also to the southwest. In fact, as it goes to the southwest it passes under the railroad cut, and the only thing that I could correlate with that vein on the west side of the railroad cut is a little streak of crushed rock in which there is no quartz whatever. It is possibly six or perhaps 8 inches of crushed material.

Q. How far is it over to that railroad cut where this peters out?

A. From the point of last exposure on the east side of the track to the point where this wall shows on the west side it is 60 feet.

Q. That railroad cut goes down into the solid material, does it?

A. Yes. The vein was exposed in the cut on the east side, shows quartz on that point, gradually get-

(Testimony of William A. Simpkins.)

ting smaller as it goes to the southwest. The same is true as it goes to the northeast and in the little tunnel at the end of the most northeasterly trench the vein exposure is, I should say, about 6 inches, possibly a little less, but I think it is about that large. There are several branches from the vein, [225] a great many in fact, two of which are exposed at a point—

Q. You are now speaking of the main vein?

A. Of the Black Tail vein, yes, the main vein,—at a point in the trench—there is an old trench dug in a northwesterly and thence in a northeasterly direction just below the letter T in the word "trench." There are two branches from the main vein at that point running into the hanging. One of them is a pretty strong branch where it leaves the vein fully 18 inches of quartz, but is only traced a very few feet, when it dies out or disappears under the wash, getting narrower. Then the next important branches are in the vicinity of 545, where there are two branches running almost due west. These branches unite on their westerly course.

Q. Just point to them.

A. Just above 203–C. Still further to the northeast is another branch running almost due east and west which also dies out as it goes to the west. It is a pretty strong vein where it leaves, about 18 inches of quartz. Immediately opposite on the hanging-wall side of the vein are two very strong branches. These leave the vein at a sharp angle and run out into the hanging, where they turn around to a direction

(Testimony of William A. Simpkins.)

nearly parallel to the main vein and they also die out. These outcrops are exposed underground in a number 1 level, or the No. 1 tunnel of the Pine. [226] At this point there is a sharp turn of at least 90 degrees where the vein turns to the southeast. I would like to make a sketch of that.

Q. Yes, do so. Point out to the Court where you are going to sketch—where it is on the map, I mean.

A. It would be at the point near 243, that is the station in No. 1 tunnel where this vein turns off at right angles. The tunnel runs in a northeasterly direction on the main vein, and there is a branch in the tunnel, something as shown. A vein runs along the main tunnel in this direction northeasterly and a branch running to the east; another branch turning at right angles to it and from that another branch turning again at right angles. These are all good, strong veins. This vein proceeds on. There is a stope at this point which I will mark "X" and that ore has been stoped around this turn on the branch vein. At the point where this stope starts, you can plainly see the branch merging and uniting with the main body of quartz of the principal vein and as the sketch in the lower left-hand corner shows. There is a distinct merging and uniting of the two veins. This is characteristic of the veins in that country. It happens not only in one place but in many cases although this is possibly the greatest turn I have observed. Even in the main vein the turn is not quite so great.

Mr. GRAY.—We offer it in evidence.

(Testimony of William A. Simpkins.)

(The drawing admitted in evidence without objection, marked Plaintiff's Exhibit 18.) [227]

A. (Continuing.) Another characteristic of this vein is its ability to widen in places, show large bodies of quartz, and other places narrow and be nothing but a gouge wall. This is illustrated plainly in the north face of the 500 level of the Last Chance claim at Station 275 where the vein becomes nothing but a gouge wall. There is a series of gouges entering the working both on the foot and hanging wall side. The gouge on the footwall follows the vein for some little distance before the quartz pinches out, but at the face it is mere gouge and no quartz. The same thing is true in two northerly branches of the No. 1 tunnel of the Pine. There is a little quartz at the face northeast of 283, very small, and it has a strong gouge wall on the foot. It is also true in the portion north of station 203 where there are a number of cross fissures, or faults, which displace the vein a very short distance. There the vein becomes mere gouge with just a very small stringer of quartz. The vein, I might say to the southeast of 128–C is pretty strong. It has been stoped in places and as it goes northerly, it gets much smaller until it is practically nothing but gouge.

Mr. COLBY.—You meant southwesterly?

A. Yes, I should say southwesterly. This same vein—possibly the same vein—is opened again in the Pearl tunnel at a somewhat lower elevation. This same condition is found to exist in the vicinity of the sand winze and the gulch winze in the same main vein of the claim where the quartz quite appreciably

(Testimony of William A. Simpkins.)

wedges out against a gouge wall, a short distance south of Station 334 as illustrated by the gulch winze at Station 340. In following this vein from the tunnel [228] at the east line,—south end-line of the Lone Pine claim, the first exposure is a split up vein, many stringers and streaks of quartz on the footwall side of the tunnel. The entire width would be hard to state. It is possibly at least 2½ or possibly three feet in a series of stringers. That runs north a short distance and is displaced by the fault to the east where it is picked up again and follows in the tunnel and then in the cut or trench continuously to a point where the tunnel enters the wash. Here again, it is observed down lower, at a lower elevation in the winze, gulch winze, where it has been followed some eight or ten feet near Station 338. North of that station in the main level No. 2, there is a hole down into the cave, where the material caved down, and in this excavation the quartz is observed in the footwall to be 18 inches thick. This is in the footwall of the open fissure, filled with gravel and sand. The distance from there to the next exposure is about 18 feet. The next exposure is in what is designated as the sand winze, and is about 6 feet lower than the floor of the No. 2 tunnel. From that point northerly, it is exposed in the face of the vein working which runs south from Station 331½. The quartz here has a northeasterly strike and is observed in two distinct stringers. It is followed continuously with the exception of a very small distance, perhaps five or six

(Testimony of William A. Simpkins.)

inches, where I could see no quartz to the point 331½. [229]

There is a wall passing out to the southwest with the quartz abutting against it. The same quartz is picked up again on the other side of the wall and is followed northeasterly but swings around the curve and I believe continually exposed from there throughout its course, into the Last Chance claim.

Q. Before we leave, what is the greatest distance in the area, between 331 and the gulch winze and workings from it, through which the vein is not exposed—from 331 on, what is the greatest distance?

A. The greatest distance is 18 feet as closely as I can measure it on this map.

Q. Is there any question about the continuity of that vein through there in your judgment?

A. None whatever.

Q. You may proceed now.

A. This vein has been followed down on its dip through various levels, including the 300, 400, 500 and 600, on which there is some drifting and some stoping. The easterly extension in the 300 level is followed to Station 329, where it is displaced by an east and west fault, a very few feet, ten feet, not over that, and again picked up south of the fault and has been drifted on to Station 343, where a branch makes an abrupt turn to an almost due east strike. The quartz is exposed in the raise at 343, and I believe it passes into the footwall. It is not very clearly exposed at that point. There are a few stringers in the south extension of that level, but I believe the

(Testimony of William A. Simpkins.)

main body of quartz is in the footwall of that work. It would be underneath the level at 344. [230] In the No. 4 level, the footwall is shown to turn to a nearly due south strike just south of Station 179, where there is a fairly good footwall gouged. There is some quartz underneath it, but it is broken and shattered. The main vein is passing out the little extension about 50 feet south of 179.

Q. That wall is continuous, though, is it?

A. Yes, sir; it is continuous and unbroken. The 500 level, the quartz has been followed to just about 50 feet south of 220 and the gouge wall is there exposed running in a little west of south direction. In the 600 level, the vein has been followed continuously from the station in the shaft to the face of the drift which is something near 45 feet south of 219, where the vein has a slight turning to the east on the southward extension and passes out the southeast corner of the level.

Q. You have observed the assays and samples taken by Mr. Herrick?

A. I have, some of them.

Q. Did you observe those which were taken of the samples 2882 and 2883, taken from the end-line trench and the end-line tunnel?

A. Yes, I observed them.

Q. And the results of $11.23 and $13.14?

A. I noticed those.

Q. Is that commercial ore in that district?

A. I should say that it was.

Q. No, Mr. Simpkins, may I inquire of you con-

(Testimony of William A. Simpkins.)

cerning the appearance of the vein as it bends around from a northwesterly [231] to a southwesterly—to a southeasterly or northwesterly strike?

A. The vein is continuous. It is banded in most cases, and where banded the bending of the ribbon quartz is plainly observable. The footwall is exposed in some places, and in some places the hanging-wall. There are few places where both walls are not exposed, but where they are exposed, there is a very distinct bending of the walls around those turns. I have some photographs of some of those places.

Q. Let us have them marked. We will have them marked Plaintiff's Exhibits 19, 20, 21 and 22. As you speak of the photograph, give its number.

A. Referring to No. 19, I will state that this photograph was taken at Station 552, looking in a northeasterly direction, and shows the footwall of the vein bending around the turn. I might state that this is the sharpest turn noted in that vein.

Q. Will you put some marks showing that bending of the footwall?

A. I will mark "A" on the left-hand side, "A" at the center, and "A" in the lower right-hand corner indicating the footwall of the vein.

At this point the banding is not so evident as in some other parts, but the quartz is plainly depicted and photographed and the footwall. The relative size of the quartz body can be seen in the photograph.

Referring to Photograph No. 20, I will state that this was taken at Station—

(Testimony of William A. Simpkins.)

Q. You said No. 19 was taken at No. 552.

A. I will have to correct that. It was taken at the [232] top of the trench where the letter "T" occurs in the word "trench" on Plaintiff's Exhibit No. 1.

Q. Just mark 19 there.

A. Looking in a northeasterly direction, and that is the sharpest bend in the vein.

Photograph No. 20 was taken at Station No. 552, looking in a northeasterly direction and shows the vein with the banded quartz. The relative size can be seen by referring to the pick. To illustrate the bending of the vein in the stope which is marked "open stope" near Station 544 on Plaintiff's Exhibit No. 1, I tried to get a picture looking in a northeasterly direction, but was unable to see a portion of the stope, standing at that point, because there is such a distinct bending that it is impossible to see the easterly end of the stope. So I took the picture from the easterly end, looking down in a southwesterly direction. It is not a very good photograph because the sun was shining and it was taken almost at the sun.

Q. What is the number? A. It is No. 22.

Q. It shows the bending of the stope around the turn, this being a station about 544 at the lower end of the stope; the picture was taken looking down the side toward the gulch.

Photograph No. 21 was taken near Station 557 on the south side of the gulch looking in a southeasterly direction and shows the quartz exposed at the top of the winze called the "gulch winze." It shows the

(Testimony of William A. Simpkins.)

banding of the quartz, and a portion of the opening where it has been braced up with stulls. [233]

Q. Mr. Simpkins, have you observed the outcroppings near Station 545? A. I have.

Q. What is there there disclosed?

A. There is a large body of quartz; I should say at least 8 feet thick, probably more.

Q. How does it stand with reference to the side of the hill there?

A. It is quite prominent and can be seen for quite a distance. There has been a little work done on it, just a small excavation, not to exceed three or four feet deep, I should say.

Q. Of what vein is that a part of?

A. That is a part of the Black Tail vein.

Q. Were you able to observe it from across the gulch, or the point about the discovery of the Black Tail?

A. I think it can be plainly seen, although I can't recall having noted it particularly.

Q. Now, coming back to the exposures underground. What is the 300 as it is marked in brown and the 400 marked in green, those portions of those two levels, are they upon any vein?

A. No, those are crosscuts which run out to the Surprise vein.

Q. Have you examined the workings in and about Stations 326 and 320, on the 200 level? A. I have.

Q. What did you observe there?

A. At 326 is a large vein of quartz, probably at [234] least 8 feet thick. It gets smaller as it goes

(Testimony of William A. Simpkins.)

southwesterly toward 330. At 330 is a cross-vein or branch, coming in which strikes in a southwesterly direction. It is observed in the little crosscut which is just south of 320 in the No. 2 main crosscut. The end of that can be seen as you look toward the face of the little crosscut.

Q. The end of this little vein?

A. The little vein; yes.

Q. Go on.

A. Then following through the crosscut from 326 to 320, a heavy gouge wall is encountered passing southwesterly, which I believe to be exposed in the little crosscut which runs in a southeasterly direction from the main workings. At this point the quartz is very weak. There is about a foot of quartz, at least 14 inches, on the under side of another gouge wall which follows in an almost south direction from 326, and that is exposed again in the main working toward 331 coming in underneath the gouge. There is about 2 feet of it, although it is not entirely exposed.

Q. You say that is a heavy gouge wall, which is found in the crosscut between 326 and 320?

A. Yes, sir.

Q. And which is again found in the crosscut, well, just south of there?

A. Just south of there.

Q. What is that shown up in the little workings running northwesterly from Station 340?

A. There is a good wall running about north 35 or 30 degrees westerly, standing 75 degrees, dipping

(Testimony of William A. Simpkins.)

toward the [235] east, with 12 inches of crushed quartz and vein material on it?

Q. Do you find it further to the south?

A. But I never seen it beyond that point. It passes into the pillar just to the south of 320.

Q. What intervenes between that and the drift on the vein between 326 and 331?

A. I should say five, possibly six feet of country rock.

Q. Any other structural feature?

A. The wall just mentioned which crosses the little crosscut south of 320 which runs in an easterly direction.

Q. Now, then, have you examined the working from 331 around through 331½ to the south face on that working? A. I have.

Q. What do you find in there and what is the course of the vein there?

A. The vein followed the drift at 331 and about 5 feet southerly from 331 where it turns to the southwest against a wall which has been followed along the drift in a southerly direction, and the wall also turns to the southwest. The vein turns against that wall. Immediately adjacent to it on the other side, or to the south, the quartz is observed, the same apparent thickness and character, running in a direction of south 28 degrees east as nearly as I could take it.

Q. Is that quartz from 331 around through this working 331½ continuous?

A. It is continuous with the exception of possibly 5 or 6 inches where I could not trace it. [236]

(Testimony of William A. Simpkins.)

Q. It is the same vein in your judgment.

A. It is the same vein in my judgment. It has pinched down to very fine minute streaks running through the rocks which no doubt are silicified.

Q. Mr. Simpkins, are you familiar with gold quartz veins in California, particularly in Grass Valley?

A. I am.

Q. Is it unusual in your experience there and elsewhere to observe veins bending as you find this Black Tail vein bending and changing its strike?

A. It is a very usual thing. In fact, it is uncommon to find a vein that is straight. They never are for only a short distance. Referring to the Pennsylvania mine in Grass Valley district, I have a distinct recollection of some litigation work which was done on the W. Y. O. D. Claim near the surface in a tunnel where they followed the vein to prove the apex of the Pennsylvania vein. It was followed in a southerly direction, when it turned at right angles and went out the side-line of the claim within a very few feet. I have in mind also a vein in Nevada, in Mineral County, I believe it is, or Nye county, called the Olympic mine, where the vein marks a turn not only at right angles but goes practically around in a circle on its strike.

Q. Are either of those veins situated in rock such as these rocks that you find at Republic?

A. Well, the Grass Valley rocks are not, but the rocks in Nevada, or in this vein I mentioned, are similiar to these rocks. It is very common in a great many cases, you see it in many camps. [237]

(Testimony of William A. Simpkins.)

Q. It has already been explained, but I would like to have you explain it yourself again for the record, the difficulty of making an actual connection across the bottom of the gulch between the vein on the south side of the vein and the north side.

A. I might say that when I first visited Republic the No. 2 tunnel working near Station 330 had been advanced to a point somewhere between 330 and 331. It was continued along on the vein toward 331 and to about 5 or 6 feet just past 331, where it apparently hit an open fissure which was filled with sand and gravel. The hanging-wall rock stood in a position about the dip of the vein and was hard rock and is there to-day. This fissure extended up the length of the dip of the vein for some distance and was entirely open, not even filled with gravel or sand. You can climb up in there. It is more in the nature of a cave, but the hanging-wall had the distinct dip of the vein, if it had been followed along here. I assume that this open fissure was the continuation of the vein. And the working was turned slightly to the southeast with the idea of continuing along this fissure to see how far the rock extended. It was something in the neighborhood, so I was afterward informed, that that wall continued in nothing but sand and gravel. At that time I gave instructions to drive a drift through the wash to the opposite side and pick up the quartz to see how far the gravel extended. Then I sunk winzes and connected across in order to strike the continuity of this vein across the gulch. That work was not followed absolutely

(Testimony of William A. Simpkins.)

according to my instructions, but in a general way. They [238] had difficulty—what was actually done was a driving of a tunnel southeasterly to about 338 or possibly a little farther. I wasn't there. But at any rate it was turned back because they found there was no hanging wall so that the vein was intersected just to the northwest of Station 340. I might state as far as I was informed a winze was started from the surface on an incline to the north as it went down on the dip of the vein to follow the vein underneath the wash. This winze caved so that it was abandoned and another winze was started practically on the dip. The first winze inclined to the north; the second winze followed substantially on the dip.

Q. This is the gulch winze?

A. The gulch winze. That was sunk 40 feet and a drift was run to the north which is illustrated as being at 346. And the next time I saw the working it was possibly in the neighborhood north of Station 349. It had caved previously and at that time was practically full of sand and gravel but the hanging-wall was well defined along that drift on the easterly side. Subsequently that drift again caved and another drift was started from 349 out around 350, with the idea of going across and picking up a quartz on the north side of the gulch.

Q. Is that open fissure that was followed down from 334 observable any place in the lower workings there?

A. Yes, it is observed at a point just north of 350, about 16 feet, a little crosscut was turned to the left,

(Testimony of William A. Simpkins.)

which would be in a westerly direction, and sand and gravel was encountered at that point; and then the drift was continued in a northwesterly direction and turns more [239] rapidly to the west and the sand and gravel is again encountered at a distance of approximately 50 feet from 350.

Q. In your judgment does that fissure represent a part of the original vein which has been scoured out and filled up with the gravel?

A. Yes, I believe the vein occupied that fissure.

Cross-examination.

(By Mr. COLBY.)

Q. Mr. Simpkins, I believe that, referring to the surface map, you stated that towards the middle of the claim that you found a great many quartz exposures, stringers and so on, that ran in every direction? A. Practically, yes, sir.

Q. Now, isn't it a fact that they predominately run northeast and southwest, the great majority of them?

A. I think that is true in the area that is exposed, which is through the center of the claim. There is a large area of the claim which is not exposed so you cannot see the fissures. I think that is true, through the center.

Q. Now, I will call your attention to the composite map and to tunnel No. 1, and that cuts a great many of these northeast–southeast stringers that are at least substantially parallel—we don't say that they are absolutely parallel, but substantially so.

A. Yes, all the way from its entrance here, they

(Testimony of William A. Simpkins.)

are even more numerous than they are in the center of the claim.

Q. And at that point they are in the vicinity of the main vein itself? [240]

A. They are in this vicinity, on the hanging-wall side.

Q. Taking the crosscut from 190 to 191, you don't find any such great number of stringers do you?

A. You find quite a few.

Q. Are they shown on this map? A. Yes.

Q. Aren't you pointing there to some fault seams, those indicated by the blue?

A. They constitute veins as much as some of these.

Q. You don't distinguish between your blue coloring and your red? A. Yes, as to quartz only.

Q. Confining ourselves to quartz?

A. There is more quartz running in a northeasterly and southwesterly direction.

Q. And you don't find quartz seams crosscutting the country in a northwest and southeast direction through this working that I have mentioned?

A. Well, a few; they are not so numerous though.

Q. And then, when we come to the Pearl No. 2, you don't find many there, do you?

A. Not so many. There are a few.

Q. By comparison with the other, they are very subordinate in number are they not?

A. I should say they are less; there are not nearly so many.

Q. Can you point out any crosscut that runs in that general direction that does cut a number of seams,

(Testimony of William A. Simpkins.)

taking, [241] for instance, the crosscut that runs from the Surprise No. 2 shaft over, we will say to the point 204. We still find these seams and quartz stringers running generally parallel with these others that we have mentioned in the middle of the claim, do we not?

A. Yes, that is true. While there are some, they are not as prominent as the northeast ones.

Q. Now, referring to the discovery trench, you examined that carefully, did you? A. I did.

Q. And what did you find disclosed in the trench?

A. I found three streaks in that trench, three little veinlets or veins, one of which has been caved since that examination, but the principal one of which trenches were started and extended a certain distance, I measured 16 inches of quartz.

Q. And as you came westerly a short distance from the trench, say between 6 and 10 feet, does that quartz narrow or widen?

A. Well, I would say that it widens slightly. I didn't measure it at that point, but I did measure it at various places. At some places I got up to 24 inches, which I believe is the greatest amount.

Q. You can get 24 inches of quartz somewhere along in that discovery vein?

A. Well, if that is the one, you can get 24 inches of quartz in some of these stringers or streaks. [242]

Q. Now, I believe you state that you can follow these continuously, that is some quartz stringers,—

(Testimony of William A. Simpkins.)

at least quartz, continues from the discovery cut to the westerly side-line? A. Yes.

Q. And the easterly side-line you jump from one stringer to another in how many cases do you say?

A. At least three.

Q. And these stringers were all continuous in the same general direction were they not?

A. Yes, they turn out of the trench in a general direction.

Q. Have you had any great experience in the examination of mining claims?

A. I wouldn't call it great. I have had some experience.

Q. According to my observation, it has been considerable. How about surveying mining claims, have you ever surveyed mining claims for patent?

A. Yes, I guess I have. Not very many though. Yes I know I have.

Q. Have you ever observed exposures, discovery exposures in this claim? A. Yes.

Q. How does this compare with many of the exposures you find in mining claims?

A. Well, it is just as good as possibly the majority of them.

Q. Have you ever examined other claims in that [243] particular district with the idea of ascertaining the discoveries that they were based upon?

A. The only one in this district is the Black Tail. I was not absolutely sure that that was the discovery at the time I looked at it, but it was certainly a very good vein exposed in that cut or open stope.

(Testimony of William A. Simpkins.)

Q. Now, I see that you have on this map here—are you responsible for the coloring of these veins on this map? A. Yes.

Q. You have quite a decided vein running northeast and southwest parallel to this general system through the north shaft? A. Yes.

Q. Where is that exposed?

A. I don't think it is exposed on the surface but it was put on there because the stopes underneath and the workings denoted that the vein runs in that direction and so we just put it on, knowing that the vein was there.

Q. You didn't find any exposure anywhere near the surface?

A. No, I don't think it is exposed anywhere near the surface.

Q. As a matter of fact, is there any vein exposed in that shaft for many feet down?

A. I haven't seen any in it.

Q. Have you seen any quartz in the dump that came from that shaft?

A. I think I have, yes, quite a bit.

Q. You are quite sure of that? [244]

A. Yes, I feel quite sure of it.

Q. And they would be exposed there to-day or your examinations have been so recent that the washing of the elements and so on wouldn't change that condition?

A. I wouldn't be positive about that. I didn't look at it particularly but I noted that vein at that time because I knew that below there they had

(Testimony of William A. Simpkins.)

stoped that and that this shaft had probably been on it.

Q. As a matter of fact, isn't that shaft a ventilating shaft? A. I don't know about that.

Q. So you wouldn't be sure about that quartz exposure?

A. I am pretty well satisfied that there was no quartz on the surface but there is quartz down lower.

Q. Now, you have had considerable experience with faulting veins, have you not, where veins have been cut off by faults or fractures that cross the country? A. I have had some experience, yes.

Q. Has it ever been your experience that where a vein is cut across a fault in that way that the ends of the segments of the vein that are broken by the fault and cut by it have been turned and dragged slightly in the opposite direction to correspond with the movement on the fault?

A. That is true in a great many cases and in many cases it is not true. It is a very difficult matter to observe the drag.

Q. And very frequently you have a sort of a toe [245] turning around where the segment butts up against the fault?

A. Yes, usually designated as drag.

Q. And in many cases you have an appreciable bend of the vein itself for a considerable distance back?

A. Yes, in some cases a very pronounced bending.

Q. Now, coming to these exposures that you have

(Testimony of William A. Simpkins.)

testified to on the southern portion and I will refer particularly to this 10-foot detail for the present, what have you out here in the tunnel that runs in beyond the large winze, beyond station 342?

A. The vein at station 342, is exposed in a hole into the hanging-wall from the drift and is the last point at which it can be observed. There is a wall or fault on this map showing several feet farther southeast but as a matter of fact having a rather strong dip to the southeast, which may displace it. At any rate it is not on this working beyond Station 342 or just a few feet perhaps.

Q. Referring to the working south of 331½ as you come along from Station 321, isn't there a considerable exposure of quartz along the right hand side of the level as you come towards the end of this working?

A. Yes, there is a pretty good exposure.

Q. What would you say is the thickness of that exposure?

A. Well, it isn't entirely exposed along about 321 but I should say at least 2 feet of it possibly—well, I think 2 feet. [246]

Q. And what becomes of this quartz?

A. It passes out to the little drift which has been extended practically south from Station 331½.

Q. Does any of it turn into the side to the west?

A. There is a small amount of quartz running into the wall at 331½ and another exposure of this same quartz just beyond the wall—in fact, they come right together with a wall between on the

(Testimony of William A. Simpkins.)

southeastern side. That is the quartz which has been followed southerly in the working you mentioned.

Q. Now, referring to the quartz exposures that are shown in the trenches that have been put on here in pencil on this Exhibit 4, I understood you to testify that there was some considerable veins shown in some of these trenches.

A. A very good vein.

Q. Where do you find, as you come northeasterly on this most northeasterly vein, the principal working being T–901?

A. A little tunnel running northerly from 901 and the quartz is observed in the bottom of the trench which connects with this tunnel on—well, I couldn't measure it all, but I would say there is about a foot of ore in that trench. It gradually narrows and appears to turn to the east as you follow it along the bottom of the trench, although I am not real sure that it does turn to the east, but anyway on the face of the tunnel there is a small streak running north 18 degrees east, as I make it, about 6 inches thick, not to exceed 6 inches. [247]

Q. Is there more quartz on the floor on the extreme right-hand side at the bottom?

A. Well, the rock itself is on the floor on the right-hand side, but up above there is a little excavation on the side of the working which would be on the east side and there is some quartz in there, but whether that is the same quartz as I saw down on

(Testimony of William A. Simpkins.)

the floor, I am not sure. It is not very well exposed in that working.

Q. What is the width of this quartz that is shown in tunnel No. 838?

A. Well, I couldn't measure the full width of it, but I would say at least 3 feet of quartz there. These trenches don't expose it very well.

Q. Now, coming to the Black Tail claim and taking the composite map, as you come northerly along that vein in the last exposure that you see in the vicinity of the point 231, what is the appearance of the vein at that point?

A. Well, the vein that crosses the crosscut at a rather acute angle at Station 231 and the working has been filled I should say halfway up, 3 feet high with debris and soil. The vein is not entirely exposed as I observed it along the side of the working going into the northwest at quite an acute angle with the crosscut.

Q. As you saw that vein there, isn't it weakening considerable from the magnitude it has in the workings a short distance back?

A. Well, it may have been weakening a little, but I don't think so. [248]

Q. Don't you think it is pretty well pinched out at that point?

A. No, I think that is a pretty good vein. The reason you don't see it very well is because you are looking at it at an acute angle with the level. An actual measurement across that quartz would be I think substantially the same as it is in the working at 231–B.

(Testimony of William A. Simpkins.)

Q. Now, take the surface map. As this vein comes downward, the Black Tail, on the surface, the last exposure I understand is in the vicinity of T-875, is it not? A. Yes.

Q. Now, the normal migration of that apex, if it continues in the same direction that you have indicated—bends for how many feet, is that estimated?

A. About 380 feet.

Q. If it persisted in that same general direction what would be the migration of that apex normally?

A. It would be thrown slightly to the east.

Q. On your connection, your dotted connection here, it has been turned slightly to the west.

A. Slightly. Well, not much—yes, I guess it is a little.

Whereupon an adjournment was taken until 10 o'clock A. M., Wednesday, August 25, 1920. [249]

Wednesday, August 25, 1920, 10:00 A. M.

Trial resumed.

WILLIAM A. SIMPKINS resumed the stand and testified as follows:

Cross-examination (Resumed).

(By Mr. COLBY.)

Q. Mr. Simpkins, in your direct examination yesterday, you drew a sketch here which has been labeled the Plaintiff's Exhibit 18.

A. Yes, sir.

Q. And that was intended to represent the plot showing that appears on this composite map Exhibit 2?

(Testimony of William A. Simpkins.)

A. It purports to represent the conditions existing in the No. 1 tunnel in the vicinity of Station 243. It is not an accurate sketch, however.

Q. What is this little bend in the view?

A. There is a cross cut or drift, as it happens to be, running from the southeast and from that another drift running in a general easterly direction.

Q. And it was your idea to compare that little occurrence with the turn that you believe the Black Tail vein has taken?

A. No, I merely mean to make that illustration to show that other turns occur in the property.

Q. Isn't that occurrence more in the nature of the horse or inclusion? A. No, not in my opinion.

Q. Isn't it a fact that they mined that right down to the junction below?

A. Well, it was a branch that departs from the main [250] vein as you go upward, so that if the surface was at the same elevation as the top of the hill it would probably be a much greater distance from the main vein than it is at this level. At the No. 2 level it is much closer, and it might represent a branch.

Q. Those spurs departing from the main vein in that magnitude are not infrequent occurrences, are they?

A. No, particularly not in this mountain.

Q. Coming back to the surface map showing the vein crossing thru the discovery cut, I believe you had considerable experience in tracing the apex in what is called the 16 to 1 mine in the Allaghany district? A. Yes, sir.

(Testimony of William A. Simpkins.)

Q. Did you find the exposures of that apex on the surface more prominent than you have found the vein here passing thru the discovery cut of the 16 to 1—

A. I was just trying to think where the discovery cut is in that claim—in the south end, isn't it?

Q. Somewhere in the south end; yes, sir.

A. Well, I cannot just recall the discovery cut in that vein. I do recall that the vein was very weak—

The COURT.—That comparison may do me some good, but it won't help the Court of Appeals.

A. The vein on the apex of the 16 to 1 was extremely weak and in many places was comparable to this vein where it showed a tremendous body of quartz underneath and pinched down to a mere seam which it did on the surface. [251]

Q. For a considerable distance along the apex and if you had sunk from various points on the apex in depth the results would have been very discouraging so far as appearances are concerned?

The COURT.—You mean in this case?

Mr. COLBY.—In the 16 to 1 case?

A. I do not hardly think that is true. The vein gets stronger as you go down.

Q. I mean there are many places where if you went down you would have found a comparatively weak condition?

A. Yes, sir. Another thing, though, that is not comparable in this case which exists in the 16 to 1 is that—

(Testimony of William A. Simpkins.)

The COURT.—I do not want to try the 16 to 1 case again. Confine yourself to this one. [252]

Mr. GRAY.—I think Mr. Colby and Mr. Simpkins ought to know all about it.

Mr. COLBY.—We tried that very satisfactorily at one time, with Mr. Simpkins' help and assistance.

Q. You have described this exposure of quartz that appears in the trench at points T–838 to T–840 and extending southwesterly, and it is your idea that they pinch out as you go southwesterly, and face away? A. It certainly does.

Q. Did you discover any fault in a southwesterly direction in the vicinity of that railroad cut?

A. I don't recall it.

Q. And along where the extension of that vein would exist if it kept on?

A. No, I don't recall any. There is an exposure on the west side of the track which has the same strike and the same direction as the last exposure of the vein, which I took to be the extension of it, and the only thing that I could find on the west side which would correspond with it.

Q. Do you know anything about the values that were found in that vein? A. Nothing whatever.

Mr. COLBY.—Mr. Gray, I understand that your people have taken some assays of that vein. Would you object to producing those?

Mr. GRAY.—Where, Mr. Colby?

Mr. COLBY.—Of these cuts; the vein that appears in these cuts.

Mr. GRAY.—Do you know of any being taken? [253]

(Testimony of William A. Simpkins.)

A. I don't know that any were taken.

Mr. COLBY.—We understood there were some taken. A. Not to my knowledge.

Mr. GRAY.—That was in the southwest corner.

Mr. COLBY.—We are in this position; we should of course have had that sample before we left, but it is one of the things that I overlooked. We have a hand sample that Mr. Lakes took and I have had it assayed since we came down here and we would like to introduce that although it is not exactly in accordance with the terms of the stipulation.

Q. Now, coming to the composite map again, Exhibit 2, you found a vein exposure crossing the tunnel approximately underneath the west side line of the Lone Pine and a little west of Station 321?

A. Yes, there is such a vein.

Q. What did you find there?

A. There is a gouge wall dipping to the west with quartz in it. There is a fair showing of quartz in it. There is a fair showing of quartz there.

Q. Dipping to the west?

A. Almost exactly on the side line—dipping to the east I should have said.

Q. And what is the width of that exposure? I would like to get the exact dip and strike of that and any further details you have.

A. The vein has a dip of 50 degrees to the east and 12 inches of quartz.

Q. And its strike?

A. Well, its strike is about as shown, which would be [254] N. about 30 degrees west. It curves

(Testimony of William A. Simpkins.)

somewhat and assumes a more nearly due south direction as it proceeds southerly.

Q. What is the average dip of this Black Tail vein here? Just give it roughly, if you can recollect.

A. I should say in the neighborhood of 45 to 50 degrees east.

Q. That maintains that average dip pretty well, does it, as it proceeds?

A. Well, yes, it is a more or less uniform vein in its dip.

Q. Now, I think you have what you call an exposure of this Black Tail in the vicinity of T–841, haven't you?

A. Yes, sir; right on the end-line.

Q. And what is the elevation at that point?

A. You mean in reference to the surface?

Q. Yes. I mean the sea level elevation.

A. I don't know that I can give you that.

Q. Approximately, is all I want.

A. Well, it is—

Q. Can't you give this from the contour line?

A. Well, yes, I could give it approximately. Well, it is somewhere around about 2885, I should say.

Q. And what is the elevation of your 600 level?

A. 2432 at the shaft.

Q. Now, will you project the position which this vein that you call the Black Tail has where it crosses the end-line, would intersect or would appear on the 600 level, if it were projected downward? [255]

(Testimony of William A. Simpkins.)

A. You want me to do that in court?

Q. Yes. What is the difference in elevation?

A. About 400 feet; a little more than 400 feet.

Q. And on a dip of 45 degrees what would the vertical displacement be or what would its position be with reference to the point that you start from on the side-line, if the difference in elevation is 400 feet? A. Well, it would be 400 feet.

Q. And will you measure 400 feet in the direction of the dip from where the Black Tail vein is supposed to cross the side-line?

A. My recollection is that that vein goes steeper than that.

Q. 400 feet?

A. Four hundred feet would be approximately at the side-line of the Apex Fraction Lode there, near corner No. 2 of the Pine claim.

Q. The top of that vein, if it were constant and 45 degrees as you state, taking into consideration the difference in elevation, would carry it from a point where as you state the apex crosses the end-line of the claim over almost to the side-line, would it not?

A. Yes, it would be approximately at the east side-line of the Apex Fraction claim.

Q. And you would have the 600 level extending back underneath that vein, if it were assumed that that is true, for a large portion of its distance, would you not?

A. Yes, assuming that those things held that depth. [256]

(Testimony of William A. Simpkins.)

Q. That is, on the assumptions that I have stated.

A. Yes.

Q. I don't want to mislead into stating anything that is not so. Now, I would like to have you point out on this Plaintiff's Exhibit 2 the postmineral faults that you have indicated here, especially along the exposures of the main stoped vein carrying the levels from 1 to 600.

A. Well, there are some in the main vein; there was some postmineral faulting along the main vein near Station 326 which has been followed out through the cross-cut, I think it is the same, south of Station 320 a little crosscut the end of which is near Station 330. This fault again appears, I believe it to be the same, near the letter E in the word "Pine" on the 200-foot level. It would be directly below the 2850 contour. There is postmineral faulting along the—I am not dead sure of it, but I think it is postmineral faulting along the hanging-wall of the vein near Station 340, close to the gulch winze. Near Station 331½ there is a postmineral fault, a small one, which passes out of the drift. And then there are a few little cross-faults in the south end of the No. 2 tunnel, between Station 342 and 348, also shown in the end-line tunnel near T–844.

Q. Now, taking some of the other levels?

A. In the 300 level there is one just south of Station 329, also at the end of the westerly crosscut from Station 329, evidently some postmineral faulting along the vein. Just how much I could not say.

(Testimony of William A. Simpkins.)

In the 4th level [257] near station—

Q. To save time, I will ask you if these blue lines indicated here at the southern extremity, the southwestern extremities of the 500 and 600 levels, and at the northeastern extremity of 500, if those blue lines there indicate postmineral faults.

A. I think there has been some postmineral movement on those.

Q. And would that not, in your opinion, account for a portion of the apparent weakening of the vein in those directions, and the disappearance of the vein into the walls of the workings?

A. It would account for perhaps some of it, but not all of it.

Redirect Examination.

(By Mr. GRAY.)

Q. Mr. Simpkins, what is the dip of the vein in the gulch winze?

A. It is about 75 degrees on an average; it is rolling.

Q. Whereabouts is that? Just point that out.

A. It is just north of Station 340; the hanging-wall is well exposed, and it is rather irregular but quite steep.

Q. And all of 75 degrees?

A. Roughly, 75 degrees.

Q. That would bring it on the 600 level about where?

A. I could not say offhand. It would be somewhere west of the present 600. [258]

Q. Where is west? A. Here.

(Testimony of William A. Simpkins.)

Q. What is the dip of the vein, as nearly as you can get at it, near the end-line?

A. It took a dip there of 57 degrees. It is a little difficult to take it in that tunnel. The veins are irregular and small, but it is somewhat steeper down lower in the gulch.

Q. There is one thing I neglected to introduce in your testimony yesterday. You have a sketch which you made on the ground of those stringers up on the surface? A. Yes.

Q. A detailed sketch?

A. Yes, I have a detailed sketch made on the scale of 10 feet to the inch.

Q. Whereabouts is this taken?

A. That was taken near Station 591.

Q. Just point to that.

A. Including the trench marked T-811.

(Sketch marked Plaintiff's Exhibit 23 and admitted in evidence and made a part hereof.)

Q. What does it show, Mr. Simpkins, generally?

A. It is a representation of the trenches which were dug at the time I visited the mine in April. The first trench running from the discovery cut to Station 591, and the second trench— [259]

The COURT.—These are all shown on that, are they?

A. Yes, sir. (Continuing.)—designated as T-811. and it shows the conditions between these two trenches and including a portion of each trench.

Q. Just show his Honor in detail how those stringers—one is followed over to another in the

(Testimony of William A. Simpkins.)

development of this quartz to the westerly.

A. The trench which comes down the hill to Station 591 shows a stringer of quartz which continues on through another stringer to a third one which has a general easterly direction. There are three other stringers, or rather a continuation of the first one around a little cliff and down over the face of this cliff to about the same points as the first one. And a third stringer runs in a general southerly direction. These have all been cut off, with the exception of one very small one, by a north-south stringer, or northwesterly and southeasterly stringer. Then there is a space of about 5 or 6 feet, where another stringer is picked up in the trench which continues down the hill. This stringer comes in from the north side of the trench and continues on down the hill.

Q. Is that typical of the way these stringers meet one another?

A. Yes, it is a fairly typical example. Besides, the quartz is indicated in pencil marks.

Q. You were asked by Mr. Colby if you knew where there were any of these right angle turns that he has spoken of. Have you observed down on the Black Tail workings on the [260] Black Tail claim any such condition? A. Yes.

Q. Where?

A. There is one in the Black Tail tunnel, in the vicinity of the Black Tail winze as shown on Plaintiff's Exhibit 2. Q. Point that out.

A. That is shown in three little crosscuts, or

(Testimony of William A. Simpkins.)

rather two crosscuts, one at a crosscut between Station 210 and 209 where there is an exposure of quartz, which is again shown in the main part of the tunnel, and then by a little crosscut between Station 209 and 205 where it is shown in the face of the crosscut about 8 feet long. It is next observed in the main portion of the tunnel running from Station 205 to 232 where it abuts against a fault.

Q. Just dot that on there as that veinlet or vein.

A. (Witness does as requested.)

Q. Just put an S on that. The dotted line, then, that you have placed there, from S to S, represents the course of that quartz, does it? A. It does.

Q. Now, with reference to these so-called post-mineral faults along the course of the vein, are they faults of any displacement?

A. Very little, if any.

Q. What has caused the gouge there that you remarked?

A. Possibly a slipping along the footwall or the hanging-wall, as the case may be, small faults.

[261]

Recross-examination.

(By Mr. COLBY.)

Q. Mr. Simpkins, how do you know how much displacement there is along these faults?

A. Well, it is indicated by the amount of gouge. There is very little gouge in most places. In certain instances it is heavier, of course it is heavier than in others. The vein in most cases is what we would

(Testimony of William A. Simpkins.)

call a tight vein. There isn't very much gouge. There has been some movement within the vein.

Q. That is characteristic of most of these northeast southwest veins, is it not, that they are rather tight veins? A. Yes.

Q. Even underground. You take the No. 4 vein; that does not show much movement or selvage?

A. There is some gouge up in that country.

Q. But I mean comparatively speaking.

A. Well, toward the north end it is more pronounced, the north end of these two workings, 283 and 203.

Q. But I am speaking generally now, and not of any particular place.

A. Generally, I should say there is not much movement along the vein.

Q. Now, referring to this little sketch that you made, and which is marked Exhibit 23, that was taken in the vicinity of 591 down to trench 811, I believe? A. Yes.

Q. And that is not on the stringer or seam of quartz which has been followed from the discovery cut down to the side-line, is it? [262]

A. No, it is on the one that was first attempted.

Q. It is on a branch?

A. Yes, where the first trenches were dug.

Q. And it is rather an erratic occurrence, is it not? A. I should say they are all erratic.

Q. But if you had found one on the main seam that ran down on the side-line, you would rather

(Testimony of William A. Simpkins.)

take it, wouldn't you, than the one that did not go down the side-line?

A. Well, I would not call that a main seam.

Q. Eliminating the designation that I have given it, if you had found one on the seam that came from the discovery cut down to the side-line, you would prefer to have an erratic occurrence like this shown there than one on a branch seam?

A. No, I made that sketch before those other trenches were dug.

Q. You have some northwest-southeast stringers in there. I think I have already examined you on that. Those are not of as frequent occurrence as the main parallel veins in the other direction, are they?

A. Well, they are not of as frequent occurrence as the main vein. They are fully as large as the majority of those which run northeasterly, but there are not as many of them.

Q. And they have not the persistence?

A. As to that I could not say, because there have been no trenches dug on it.

Q. I will take you underground again, and if you think they are as frequent I will ask you to point them out [263] again on these levels.

The COURT.—Have you been over that?

Mr. COLBY.—Yes, he has been over that, but he states again that he has found them of as frequent occurrence.

The COURT.—You examined him fully on that yesterday afternoon.

(Testimony of William A. Simpkins.)

Mr. COLBY.—Then I will not carry that portion of the examination any further. I misunderstood you, Mr. Simpkins.

A. I did not intend to say that they were of as frequent occurrence as the northeasterly stringers.

Mr. COLBY.—That is all.

Mr. GRAY.—I offer this patent of the Lone Pine claim.

Mr. COLBY.—We do not deny the title, of course.

(Patent marked Plaintiff's Exhibit 24, admitted in evidence and is made a part hereof.)

Witness excused.

Mr. GRAY.—That is all. We rest.

Mr. COLBY.—I do not believe we called the Court's attention to the question we spoke about this morning.

Mr. GRAY.—Yes. We are simply trying out the question of title, and not any question of any ore which has been removed. That has been understood.

Mr. COLBY.—We admit that we have removed the ore that they claim.

Mr. GRAY.—And within the planes. [264]

Mr. COLBY.—And within the vertical planes of the claim that is owned by the defendant.

Now, may it please the Court, the only justification that I have in making an opening statement for the defendant is the fact that I feel that there should be presented to your Honor in complete and concise form the exact defenses and the nature of

the testimony that will be introduced in support of those defenses by the defendant. Your Honor has already gathered from the cross-examination here, the testimony that has been given, a knowledge of what those defenses are. But in order that they may be brought prominently before your Honor before we introduce our testimony I am going to take up a few minutes in so conveying to your Honor the ideas which we have in mind. Now, I would like to arrange our exhibits, since I will refer to them in the course of this examination, and I think that it would be very much easier for the testimony to be given if those exhibits were placed on the level of your Honor's chair.

The COURT.—Very well.

(Mr. COLBY arranges exhibits.) [265]

Most of the testimony will be directed to this model because a model of this character enables one to observe three dimensions, whereas a map only enables us to observe two dimensions and for that reason I think most of our testimony will be directed to it.

Your Honor will observe over the surface here these wires represent the contours and configurations of the surface on the ground by the general walls of the topography and you can get some idea of the surface conditions that appear on the ground in the vicinity of these mines.

The claim lines are based upon the map. The Lone Pine claim does not appear in its full size but does appear on the maps, but the greater portion is

given, the portion to which testimony has been given. That is true also as to the Black Tail claim. The entire claim does not appear, but only that portion in which is set out the mine workings; but the territory that is particularly in dispute here is all shown on this model. Not only the surface appearance but the underground exposures, as nearly as they can be represented on a model of this scale.

There are two defenses which the defendant relies upon in this case, and one will be that the discovery of the claim which appears at this point and which has been previously testified to is the real discovery of the vein; that that was the first point where the locator found his quartz in place and identified it by placing his location notice in the immediate vicinity, not more than six or ten feet away. That is borne out by the subsequent events, such as the patent survey [266] calling this the discovery upon the patent, that it appears as the discovery cut and in the patent itself, it is referred to as the discovery cut. This state of facts we contend is conclusive on this question, in view of the fact that the vein passes through near the exposure of quartz extending in either direction, can be carried until it crosses both side-lines.

Now, on that particular feature of the case and on that defense, some testimony was given on the other side to the effect that this vein here was the vein of first discovery; and we will show that that is not the case, but that the discoverer of this claim, Mr. Phil Creasol, did not see Mr. Welty out there upon the Black Tail ground, as Mr. Welty testified to, the

evening of the day on which he made his Lone Pine location. Mr. Creasol came from a camp way down on the San Poil somewhere below the town of Republic, or one of the branches of the San Poil, came up across this range that morning with one of the other locators, a Mr. Ryan, and they located various claims as they went along; that when they got opposite this hill upon which the Lone Pine is situated, they separated, Mr. Ryan coming across and over into the vicinity, of this Black Tail ground, whereas Mr. Creasor went around and crossed beyond the end of the claim, of the present Lone Pine, and came on to the claim from the opposite direction from the one which it is contended by the plaintiff the locator approached his discovery point and that it was impossible for him to have seen this vein before he posted his notice of discovery and made his discovery. Not only is that a fact, [267] as we will show, but when he came down from this point and after having made the discovery, it was getting towards dark and Mr. Ryan was calling to him from this hill over here to bring the axe over, he came down from this point in some way without noticing there was a vein there at all, and the next day he come up with Mr. Welty and Mr. Ryan—Mr. Welty the man who testified here and who is the witness on location—came up and staked out the Lone Pine claim; that they did not know even at that time that this vein existed because this country is covered,—the rocks, to a great extent with likens and decomposition and discolored in such a way that no one, not even experts who have the

greatest insight into the bowels of the earth, could tell that that was a vein without chipping it. And that there are exposures of country rock, that is not veins that carry quartz in it, some of these veinlets, going down the side-line cross over but there is no evidence of any exposure here, there is no information conveyed to the locator that it is quartz unless it happens to be exposed as such and either broken off or weathered off so that the quartz appears.

We will also show that it was nearly a month after the location was made that any work was done on this other vein, instead of being two or three days, as it has been testified to, we will show that that was impossible, because Mr. Creasor after making this location went to a considerable distance to have his location notice recorded without coming back upon the vein, and that it would have been impossible to have carried on this work in the meantime, and when he came back, they did start some work, and it was many days later, so that [268] by no possibility could this vein be identified as a discovery vein, and the work that was done there identified as discovery work.

We will also show as a second defense, that even conceding by any possible stretch of the imagination that this were the discovery vein, that this vein crosses both of the side-lines of the claim located, and that this extension which has been pointed out or this occurrence in these cuts and this incline over on the southwest corner of the claim is a bold, defined vein in the sense that it is a considerable width and has a considerable strength and value, and that

it crosses out through the claim and is carried through that side-line, maintaining its integrity and its persistence and its magnitude. That that vein or that exposure there is almost in line, such a slight variation that no one would ever think except by way of controversy of denying that it had practically the same strike and dip as this main vein and would be the natural thing which everyone would expect to find nomarlly as the continuation of a vein going on.

We will also show that this main vein was worked for some 20-odd years, nearly a quarter of a century, before anybody conceived of the idea that it turned at right angles *at* became a part of the Black Tail vein.

We will show that there are occurrences here which cross this vein, there are vein occurrences, quartz appearing in places, which I have spoken of, where these little strips which are not intended to represent the actual vein, but simply are a *contention,* but these strips do actually represent the vein that was found in the ground and extracted, we will show that [269] there was a great breaking up in that country between them, dislocation by faults and by crosses, and that there are cross-exposures of faults, as has been contended by the opposition, and that those cross-exposures, however, can be related to another system of veins. That there are two prominent systems of veins in this country that have been generally recognized, one the northeast and southwest on which the Lone Pine No. 2 is the major one, and the No. 4 is a minor one, and No. 3

and other smaller veins in here are parts of the same series. We will show there is a system of veins corresponding to the Black Tail vein also in this country. The Surprise vein which has been called to your attention, and which lies as I represent by my stick here, the yellow color on this shaft and also on this level indicating the exposure of the Surprise vein. To a great extent, some two or three thousand feet, it has been exposed. That the Black Tail vein is a similar vein, a bigger and more powerful vein. That this Black Tail vein extends generally in the same direction and while it has not been traced across a side-line according to our views, we will show that those exposures which the opposition have found and testified to, coming up to the end-line, I should say—I used the word side-line,—that they are of minor insignificance; that they are sporatic occurrences of the character which have been designated as filling in this country, which cross at an angle to the direction which it should be in if it is a part of this Black Tail vein. We will not deny that there is some likelihood that this Black Tail vein continues on and could, perhaps, on greater exploration, if it is not too much disintegrated and [270] disorganized by this broken ore condition here, could be found continuing through, because it compares in many places to the northwest southeast system of veins which I have already mentioned.

Now, we find here on this model a little yellow winze. You do not see that winze on any of the exhibits of the other side. In fact, it was only shown by a winze designation on their surface

maps, since they have no model which would indicate its position in depth. That little winze there we will show by men who worked in it and who extracted the ore that was taken from it, contained a vein of considerable magnitude, a vein that was in many ways comparable to what was found over there towards the Black Tail, and whether it is or not we do not know, it has the same direction and it is a part of the northwest and southeast system. It is in the footwall of this main vein, the main No. 2 vein, which is shown here, this red place, and has passed beyond it, unquestionably going in a northwesterly direction. Now, what becomes of it beyond that, we do not know, except that it is a vein of considerable persistence and should continue for some distance beyond. We do find in the Pearl tunnel here which is indicated as I hold my pointer, a vein crossing which has a somewhat similar character as far as width is concerned, a foot or more of quartz and vein material, also accompanied by a considerable gauge, *as is* the vein which is in this little incline which I previously mentioned, and it is a good reasonable supposition that that is a continuation of the same vein because those crosscuts which your Honor sees passing in a [271] northeasterly direction through the country would certainly expose all vein conditions or crosses in that territory, and therefore the probability is that this may be a part of that vein if you care to project it that far. It is the only thing at least that occurs in that direction, and it is something that is comparable to these northwest southeast veins.

Now, as a result of these complicated conditions of one vein system crossing another, of which there is no question, as we shall show from the testimony, because the facts are there, the veins are in the ground, and a considerable faulting through this area here, we find two veins intersecting each other, with faulting in that immediate vicinity. That gives you a very complex country condition and one difficult to work out, and the difficulties have been doubly magnified by reason of the existence of this little gulch here. That little gulch has carried down considerable wash so that you have to go to a depth of a great many feet from the surface before you can get these vein exposures, and the whole complication that is before your Honor, has to a large extent resulted from that combination of circumstances which we cannot avoid, and both sides endeavored as best we could to clear it up so that it might be presented here in as clear a manner as possible.

We will show that a vein of this character cutting through the country as this vein does on its strike and the outcrop of it following along a steep hillside like this, the apex will necessarily migrate to the south, that it would be unavoidable, because of those physical conditions. In one of [272] these trenches down here, we strike one of these cross veins. It is followed right on and considered a part of this apex of the Lone Pine No. 2 vein. Then we will show that there is quartz existing in such condition on the No. 2 level which is colored

here in red in the vicinity of Station 331 which if continued on would unquestionably connect up with this exposure of quartz of considerable dimensions which I have already mentioned, which comes across these cuts and across the side-line of the claim. So I say if we take the two horns of the dilemma, if in the first place we consider this discovery vein, the case is won by reason of the discovery vein crossing the side-lines, and we will prove that the No. 2 Pine vein also crosses the side-lines by reason of the extension which we find normally continuing on in the same strike dip beyond. And we will show that a vein of this magnitude, it would be of the highest improbability that it should turn and become the comparatively weak character of vein which has attempted to be carried across and the exposures which have been attempted to be carried across the end-line of the Lone Pine claim in a southerly direction. All I can say of that is that it reminds me very much as if the Black Tail was trying to widen this big dome over here.

That is the comparison between the two veins. I think I have covered all that is necessary in the opening statement, and we will proceed with our testimony. [273]

Testimony of Albert Burch, for Plaintiff.

ALBERT BURCH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. Mr. Burch, what is your profession?

(Testimony of Albert Burch.)

A. Mining engineer.

Q. And how long have you followed that profession? A. A little more than thirty-one years.

Q. What has been your experience during that period of time? Narrate briefly, if you will, to the Court what work you have been engaged in along the line of your profession.

A. In the beginning I commenced simply as a surveyor for the first two or three years, and since then I have operated upon my own account and have been superintendent of some rather important mines, manager of others and consulting engineer for others, having made a large number of mine examinations for prospective purchasers in all of the western mining states of the United States, Alaska, British Columbia, Yukon territory, Mexico and Cuba.

Q. You were at one time I believe manager of the Bunker Hill and Sullivan mines over in Idaho?

A. Yes, sir; I was superintendent of the Bunker Hill & Sullivan for a period of between four and five years, and was manager for two years after that and then was consulting engineer for several years following.

Q. I believe you were also manager at one time of the Goldfield Consolidated mine in Nevada? [274]

A. Yes, sir; I was consulting engineer for the Goldfield Consolidated for a year and manager for two years, and then was consulting engineer again for six months after that.

Q. Is that a mine of considerable magnitude?

(Testimony of Albert Burch.)

A. It was at that time.

Q. How much has been its total production, roughly?

A. Around sixty-five million dollars.

Q. I will not go into detail with the rest of your mining experience, but I will ask you if you are familiar with any of the mines of Republic?

A. I am familiar with the Lone Pine and with the Black Tail.

Q. You have made an examination of those mines, have you?

A. Yes, sir; I made an examination of those mines in July of this year, and in this month, August.

Q. You made two different trips for the purpose of examination? A. I did; yes, sir.

Q. And did you examine that territory carefully with the idea of finding out what the vein occurrences were and what the general conditions that were related to the mineral exposures were?

A. I did.

Q. As the result of that examination I will ask you to tell the Court what you observed and use your own discretion in the manner of telling it and the way that you go about it. I might state that we will later on prove and identify these. [275] We might as well have these offered as exhibits as later on, and later on identify them and ask them to be accepted.

A. Do you want them marked now before I begin?

(Testimony of Albert Burch.)

Q. I think so, so that we can refer to them. We will take first this surface map which we will label Exhibit 26. Then take the composite map we will label 27 and the map showing the Black Tail and Lone Pine No. 2 levels we will label 28 and the model we will label 29.

A. An examination of both the surface and the underground workings of the territory involved shows immediately two systems of veins, viz., the rather persistent northwest-southeast veins as shown by the Surprise and the Black Tail, and the numerous northeast-southwest veins, as, for instance, the discovery vein of the Lone Pine, the Lone Pine No. 2 vein, and many others which have that general course. There are very few of the northwest-southeast type, very few indeed, but there are at least six rather important veins having the northeast-southwest course, and scores of veinlets. There are not even very many northwest-southeast veinlets. The fractures in the northeast-southwest direction are very much more numerous. [276] It therefore becomes comparatively easy to identify the northwest-southeast veins from the rather distinct exposures while it is difficult to do the same the veinlets of the northeast-southwest system, because they are so numerous. It is not difficult, however, to identify by means of the rather widely separated exposures the really strong veins of that system; and of the strong veins the Lone Pine No. 2 is the largest. Others are the Lone Pine No. 4, a vein which is exposed in the Pearl tunnel that may

(Testimony of Albert Burch.)

or may not be the discovery vein as shown, extending from Station 322 through 323 and dotted across in the vicinity of 325. Then comes the Lone Pine No. 2 vein, which is a strong one and within the Black Tail workings; and on the Black Tail surface is a vein that is exposed between 206 and the crosscuts which adjoin to the east of Station 205. Another one on the surface is between the shafts near 529–C and near 113–C and on to the northeast. These are among the strong veins of the northeast-southwest system. Belonging to that system is the discovery vein of the Lone Pine. That was first opened at the discovery cut upon the summit of the hill, and in that we see two bands of quartz with country rock in between, but the larger and more persistent and important one of the two is at that point about 16 inches in width. Going westerly, it rapidly widens to where we get about 10 and 20 feet west, we have 5 feet of quartz in that vein. It has been followed by trenching continuously to the southwest as shown by [277] the white trench with the red line on top of it extending down the hill to where you see a gap between the two trenches. That is a section where the rock is bare and the vein can be seen in the rock and is painted on the wire below the trenches proper. From that point, with the exception of a very little interruption by a fault where I hold my pointer and where the blue line is shown, a displacement of just a few inches, the vein is continuous down the cut to the westerly side-line of the claim where it is 2½ feet to 3 feet in with.

(Testimony of Albert Burch.)

Going easterly the vein is followed continuously to the cut or near the cut in the vicinity of Station 292–C. There we find it interrupted again by a fault. The same fault is exposed in the underground workings. It crosses the end of the working extending northeasterly from Station 203 in the Lone Pine No. 1 tunnel level and the working upon the No. 4 vein. The No. 4 vein is displaced a distance of something like 3 or 4 feet by that fault. It has a course as I hold my pointer between the two points where I have shown them. It has a dip towards the northeast which carries it up to a position on the surface where there is, I think, the tracing of a vein upon the surface. There the displacement is comparatively small. It cannot be more than 2 or 3 feet, because going down the hill towards the northeast we find the quartz coming into the side of the trench about as I hold my pointer. It goes out on the opposite side near [278] the Station 219–C. From this fault which I have just described down the hill to the easterly side-line of the claim the vein is continuous. The quartz is not continuous. There is a section of about 8 or 10 feet between the two lower cross-trenches and about where I hold my pointer through which there is very little quartz in the vein. The fracture is distinct. You can see the sheering of the rock such as you frequently see along a vein, but there is not much quartz. The quartz is in little stringers and little bunches for that section of about 8 feet. Otherwise, the tracing is absolutely continuous of that

(Testimony of Albert Burch.)

vein from one side-line across to the other and I have not a shadow of a doubt as to its identity as one and the same vein all the way across. It branches. There are some little branches shown on the westerly slope of the hill near the summit where I hold my pointer. These have not been followed continuously but very likely they turn around and reunite, forming horses in the vein. Whether they do or not is immaterial and we did not follow them.

The vein which has yielded all of the ore that is involved in this particular controversy is the No. 2 vein. That is a large one underground. There are places on the surface where it is not so prominent, but still it is a persistent vein, one that you can follow quite readily upon the surface, since it has been exposed by clearing off and of course in places nothing seen, just a vacancy [279] beyond the great red stope that is shown upon this model, Exhibit No. 29, comes up to the surface at 3 points. The vein crosses the easterly side-line of the claim about where I hold my pointer, just southerly from the white raise that has been driven from No. 1 tunnel level upward to the surface. It is readily traceable upon the surface and through those tops of stopes over to the end of the stope and then by means of a trench which goes down quite as much on the dip as it does upon the strike of the vein to a point where it is cut off by a fault. The trench continues to follow that fault down to where there is surface debris so deep that the trenching did not reach rock in place. It will readily be seen that

(Testimony of Albert Burch.)

the upper section of that trench here does not follow more nearly down on the dip of the vein than it does on its strike, as is shown by the projection of my pointer upward from the stopes below. The fault did not result in a very material displacement of the vein. The horizontal displacement is slight, and in fact throughout the entire length of the fault between the two ends you find more or less drag quartz of the vein. The vein quartz is evident in fragments all along the trench at which I hold my pointer—no station numbered but the lower end of the trench above No. 2.

Q. At Station 558 is it not?

A. Yes, Station 558. There we lost sight of both the fault and the vein upon the surface. The vein is picked up again in the trench which terminates near Station 200–C, though 200–C, I think, is a surface station [280] and the vein is exposed in the cuts from that point on southwesterly, cuts at 576, 575 and 574 and on down to the side of the railroad excavation. The railroad track runs along this shaft where I hold my hand and the vein is exposed down to the side of this excavation. There, standing up plainly in the side of the railroad cut is the plane of the fault against which the vein terminates, so far as you can see. At that point again an attempt has been made to pick it up beyond that though I think the displacement is probably very slight indeed. That vein there also crosses both the east and the west side-lines of the Lone Pine claim which is shown by the white lines upon the model, Exhibit No. 29.

(Testimony of Albert Burch.)

Underground, on the 200-foot level we find the vein continues to the northeast from the vicinity of Station 326 and between Station 326 and Station 64–C we see on this level the downward continuation of the same fault that shows upon the surface. It is a fault which for a short distance conforms to the footwall of the vein and then departs from it, cuts across diagonally and continues out under the wash in a nearly southerly direction. The fault has nearly a north and south strike but between Stations 330 and 331 on the 200-foot level we begin to find the vein again on the under side of the fault, coming in to the side of the drift; and the horizontal displacement is not to exceed 25 or 30 feet. In fact, we find a portion of the vein in the little crosscut [281] going northeast from Station 65–C, also underneath the fill. Continuing southwesterly, the vein is followed by the workings running out from Station 331 southwesterly to its face where it is—oh, 5 or 6 feet wide—quartz in the face of the opening. There is a gap through which it has not been traced under the surface debris amounting to about 65 feet and I might say in connection with that that when I first visited the property it was plainly evident that these two would connect and my first effort was to endeavor to obtain permission to make that connection. We finally succeeded in getting it, but two weeks time was lost. If we had had that additional 2 weeks we could unquestionally have connected that vein right across underneath that debris.

Now, I have prepared a little model which I will

(Testimony of Albert Burch.)

refer to in a minute. We will take up, however, before using that the Black Tail vein. The Black Tail vein is a good vein and upon it there has been a considerable stoping in the Black Tail ground as shown by the yellow stopes toward the southeasterly end of the model. And I might say that the color scheme used upon this model and upon the other exhibits, is this: Northeast-southwest veins and veinlets are shown in red; northwest-southeast vein systems in yellow; and faults of all sorts in blue. The yellow vein shown in the Black Tail workings upon the Black Tail tunnel level, as you will observe, has a very straight course, unusually straight. Most veins are crooked; but it has an unusually straight course from [282] the point where it is interrupted by a fault, where I hold my pointer to the most northwesterly exposure upon that level. It has been picked up beyond that fault which has a displacement of about 50 feet and found again going in a southeasterly direction. What I believe to be the same vein is seen in a raise which is above what is called the gulch winze on the other exhibits, but I am not certain whether that is the same vein or not because of the faulting that intervenes, the throw of which I do not know. It is reasonably certain that the exposure in the end-line cut and the end-line tunnel is not an outcrop of the Black Tail vein at all. Your Honor will see that it has this straight course and a dip as I hold my pointer. Carrying out that towards the end-line to the Apex would gradually curve round to the east and cross the end-line at a point considerably

(Testimony of Albert Burch.)

further east than the end-line cuts. In fact, the end-line cut does not show anything that looks good enough to me for the Black Tail vein. The Black Tail vein is a good vein and yet in the trench northerly from the end-line cut we have what appears to be probably the Black Tail vein again and intervening we have the fault which is shown in blue upon the Exhibit No. 29 and which is also shown on some of the exhibits of the plaintiff. The same fault appears on No. 2 tunnel level as shown upon Exhibit 29 and is also shown upon some of the exhibits of the plaintiff. It is possible that that intervenes [283] between the segment of the Black Tail as developed in the Black Tail ground and the segment which is probably Black Tail vein on top of the gulch winze. Now, then, it is my opinion that the Black Tail vein crosses not only the No. 2 but crosses practically all of these other northeast-southwest veins. The No. 2 vein also crosses the Black Tail. Originally the situation, as I conceive it was about as shown by this model. [284]

Mr. COLBY.—Let us have that marked.

(Model marked Defendant's Exhibit 30 admitted in evidence and made a part hereof.)

A. Using the same color system and orienting the model so that you are now facing north, and looking in that direction, you have the red, northeast-southwest No. 2 vein crossing the northwest-southeast Black Tail vein. That was the situation, as I conceive it, before the breaking along the fault which I have described as being in the end of the trench near Station 558. The result of the faulting movement,

(Testimony of Albert Burch.)

which was a perverse fault or thrust fault, was,—I might also show you the veins as they dip, the red vein being the No. 2 and the yellow vein being the Black Tail with their proper dips—the cutting of this has been done upon straight lines. Neither of the veins nor the fault is straight. We used a saw and it was almost impossible to cut the curves as we could otherwise have done. Cutting across both veins, therefore, is the fault which is shown in blue and the thrust fault upward, throwing the vein upward, the block of ground upward, brought the ground up until the veins *we* in a position as I saw it now. Now, conceiving that we have taken off the surface of the ground down to the 200-foot level, we have then the veins as shown in the workings upon that level, or as near to it as you can get to it with straight line saw cuts.

Q. That is as they exist to-day?

A. That is as they exist to-day.

Mr. GRAY.—Before you leave this surface, here is the No. 2 level. [285]

A. This is the No. 2 level, yes. Those are the workings of the No. 2 level with the exception of this extension of the drift southerly from 331 which had been made since the model was made. The same thing will appear—you will observe by looking at the model Exhibit No. 30 and the map Exhibit No. 22, that the same workings with the exception of this little extension southerly from 331 are shown upon the plane of the model and upon the map with the veins in the position which they

(Testimony of Albert Burch.)

occupy to-day in that ground. Now, with reference to the extension of the Black Tail, northwesterly from the Lone Pine No. 2, we have a winze which is not shown upon this model Exhibit No. 28, in the position where I hold pointer at Station 64 or 64–C. The winze is sunk upon a vein which dips about as the Black Tail vein does southeasterly and has about the same strike. That winze is shown upon the model Exhibit No. 29, where I hold my pointer near Station 64–C. What I believe to be the same vein is disclosed in the Pearl tunnel near Station 92–C, where about 4 or 5 feet of quartz is found overlying a gouge. And by the way, it is rather characteristic of these northwest-southeast veins that there has been movement upon them resulting in the formation of a gouge, while the veins on the northwest-southeast system of veins are generally tight, the walls are tight, and there has been practically no movement upon them. That also helps to identify veins upon opposite sides of a fault, with reference to those of the northwest-southeast system. Going downward into the mine, this same fault is readily identifiable upon three lower levels. It is seen on the No. 3 level at the last crosscut to the right going southwesterly. It is seen on the No. 4 [286] Level at the mouth of the crosscut leading over to the Surprise shafts. And by the way, on that level, some of the vein under the faults is also picked up beyond the faults, a little of it, but the working is turned and leaves it because the strike of the vein is more nearly west

(Testimony of Albert Burch.)

than the direction of the working. The same fault is seen again, down at the southwesterly end of the No. 6 level. It is a persistent feature readily identifiable, and the direction and extent of the movement results in bringing veins which originally were crossing each other into the position which we find them to-day in the ground. With the exception of that interruption, therefore, by faulting, along which there is more or less drag quartz, we have a No. 2 vein traced from one side-line of the Lone Pine claim to the other side upon the surface. I cannot conceive of any other reasonable explanation of the phenomena which we see in this ground. It is possible that veins do turn at substantially right angles and persist for long distances upon portions at right angles to each other. That is all possible. Almost anything is possible in nature. But in my experience, I have never seen an occurrence of that kind in a homogeneous rock, with the possible exception of the vein in the Gold Field Consolidated and there the reason was very apparent. The vein was straight in its course for a long distance down from the surface. At a considerable depth it became, instead of a fissure vein within a homogeneous rock, a contact vein between local light igneous rock and the underlying shale. It conforms to that contact. The contact was crooked. It was the way the lava flowed out over an uneven [287] surface and when it reached the point where it conformed in position to that contact, then it made many spurious gyrations and incidentally became a worthless vein.

(Testimony of Albert Burch.)

I am somewhat familiar with the veins in the Pennsylvania and Empire and North Star in the Grass Valley camp which have been referred to, and it is true that those veins make bends to the extent of around 60 degrees. But to the best of my recollection, though I have not been in either of those mines for six or seven years, those changes of course, do not persist very far. On the dip, I would say that the greatest distance is perhaps sixty feet, and then you get the persistent direction of the vein beyond. On strike it might be considerably more because of the encountering of the planes at a different angle. But those are veins several thousand feet in length, and the general direction is maintained throughout the entire length with those saw tooth changes in course.

Now, with reference to the bending of the No. 2 vein, in the southerly or southwesterly end of the stope, there is a slight bending there, and there is also a slight bending undoubtedly in the vein beyond the fault, over in the section where it is exposed by the cuts, and between the last cut and the workings on the No. 2 level. That is what you would expect in connection with a fault movement. I will draw a sketch to show what usually occurs. Assuming the blue line to represent a fault, and assume that that cuts through a vein and displaces it, even on the opposite side of the fault, and the bend to have a curve about as I show it here, assuming that the direction of the movement is as I have drawn the [288] black line, that is what we actually see in

(Testimony of Albert Burch.)

the ground at the southwesterly end of the stope upon the No. 2 level of the Lone Pine.

Mr. COLBY.—Let us mark that as an exhibit.

(Diagram marked Defendant's Exhibit 31 admitted in evidence and made a part hereof.)

A. I believe I have answered your question, Mr. Colby.

Q. Mr. Burch, you have had considerable experience with discovery veins, have you not, in your various examinations? A. Yes, I have.

Q. How does this discovery vein that passes through the discovery cut compare in magnitude and appearance and size with many of the discovery veins which you have encountered in your examinations?

A. I would say it was quite up to the average, but not above.

Q. I would like to call your attention to the No. 4 vein. I do not believe you described that, did you, in any detail? A. Not in detail; no.

Q. I do not care to have you go into any considerable detail, but just state generally what conditions you found in connection with this No. 4 vein.

A. The No. 4 vein exists as a plain vein ranging from perhaps 2 feet up to as much as four or five feet in width underground where it is exposed on the No. 1 Tunnel Level, and on the Pearl tunnel level and in the stopes between. [289] There has been a small amount of stoping upon the vein, indicating that ore of a commercial grade had been

taken from it. It belongs to the northeast southwest system.

The COURT.—That is as far as the vein has been followed, is it?

A. That is as far as it has been followed. I think that we have an exposure of the same vein on the surface in the cuts at the extreme north end of this model. One of the cuts, by the way, which was made very recently, does not appear upon the model. It is about 30 or 40 feet southwest of the southernmost one, and the vein appears in that. I think that that is probably the same vein, though it may not be. It is displaced where I hold my pointer, by the same fault that displaces this discovery vein, which has a dip in the direction that I hold my pointer, and if that were a thrust fault, then the No. 4 vein would be brought up to the surface into the position where a vein is exposed.

The COURT.—Nothing but surface work has been done on the discovery vein?

A. There is nothing but surface work done on anything that we are sure is the discovery vein. There is a drift driven from the No. 1 tunnel level, near Station 314, fifty feet southwesterly and about 40 feet northeasterly that may be upon the same vein. Also in the Pearl Tunnel we have a working for a short distance each way from the remaining tunnel and an exposure where I hold my pointer there. But whether it is or not I would not be able to say without connecting through, because there are a good many branches to that vein upon the

(Testimony of Albert Burch.)

surface. It is in a region where there [290] are a number of small veins. You can readily see, your Honor, as is shown upon the No. 1 tunnel level, that veinlets consisting of quartz to the number of 15 or 20 are crossed by that working, and to be positive that one or the other of these is the same as the discovery vein, would be impossible.

Q. Do you find many cross-veins crossing this parallel system that you have described, crossing them in a northwesterly direction?

A. Very few. There are only two that I would dignify by the name of vein, that I know of. One is the Black Tail, and the other is the Surprise. And even of the little veinlets there are very few indeed.

Cross-examination.

(By Mr. GRAY.)

Q. Won't you hold your pointer on that fault that you spoke of as faulting this so-called discovery vein on its way to the east side-line?

A. (Witness indicates same.) Here is the one exposure right there, and the other exposure right at the end of that drift.

Q. Hold your pointer the way you have it, also another pointer down on the dip of it.

A. (Witness does as requested.)

Q. How large a fault is that, Mr. Burch?

A. It is a heavy gouge.

Q. How wide?

A. It is a gouge, I would say, ranging from 2 inches [291] up to 5 or 6 inches in width.

(Testimony of Albert Burch.)

Enough so as to produce caving in above on these drifts.

Q. What is its size where you say it faults the so-called discovery vein at the surface?

A. I don't know. I cannot identify it on the surface there at all, because you cannot see a gouge. A gouge is the first thing that would be washed away.

Q. Where is that vein faulted at the surface?

A. It is faulted from the point where it leaves the trench about station—

Q. Let us get over to the map. Show his Honor where you are showing that fault.

A. The fault is not shown here, but the dislocation is shown, the little trench where I hold my pointer now.

Q. North of Station 582?

A. Yes, the second trench up the hill from the trench on the side-line.

Q. But you did not find the fault there?

A. I could not find the gouge.

Q. I asked you, you did not find the fault there?

A. Yes, I find the evidence of a fault.

Q. Do you find the vein on the two sides of the fault? A. Yes.

Q. And what is the evidence of the fault other than the fact that you have two stringers, one on the east and one on the west?

A. The evidence is this, that you find those in addition to that part of a fault underground which, projected [292] up, arrived at that point.

(Testimony of Albert Burch.)

Q. As a matter of fact, between those two, you crosscut in country rock, didn't you A. Yes, sir.

Q. How far up did you project it?

A. To that point (indicating).

Q. How far up in hundreds of feet?

A. About 150 feet.

Q. Through undeveloped territory?

A. Yes, sir.

Q. Is it developed at that point 150 feet from where you projected it? A. It is not.

Q. How many hundred feet is it to the nearest exposure in this projection?

A. In a horizontal direction, about 280 feet.

Q. So this little 2-inch to 5-inch seam of gouge, in order to fit this theory, you have projected 280 feet horizontally and 150 feet vertically, to get it up to fault this little vein? A. That is correct.

Q. All of these faults that you speak of are post mineral? A. I don't know.

Q. What is your judgment?

A. My judgment is that most of them are. I think all of them are as far as that is concerned. There aren't very many faults.

Q. The one you have pictured to us, on Exhibit 30, [293] the one which you say is so persistent, is that a post mineral fault?

A. Yes, I think unquestionably it is. It displaces that vein.

Q. By that you mean, Mr. Birch, that it is later than the mineralization? A. Yes.

Q. And is unaccompanied by mineralization?

(Testimony of Albert Burch.)

A. Yes.

Q. Now, you say that is a thrust fault, and you have undertaken to show in this model the displacement of it? What is its displacement?

A. About 120 feet.

Q. In what direction?

A. Upward and to the south.

Q. Where did you measure it?

A. Where did I measure it?

Q. Yes, sir. How did you get the measurement? [294]

A. I measured it along the slope of the fault.

Q. You measured it along the slope of the fault?

A. Yes, sir.

Q. Between what levels?

A. Between the 200 level and the point which would bring the veins back into a position in line with their known positions on each side below.

Q. Assuming that your theory is correct?

A. Assuming that my theory is correct, yes, the only theory that seems to fit.

Q. The only theory that seems to fit?

A. Yes, sir; to fit the facts.

Q. Of the two, possibly it is more possible. Now, Mr. Burch, you have carefully of course gone over the surface and undertaken—by the way, are you responsible for the coloring upon the exhibits?

A. I have checked a great deal of it.

Q. You have checked it enough so that you are satisfied to testify it is substantially correct?

A. I think it is.

(Testimony of Albert Burch.)

Q. It represents your views of that geology?

A. Yes, sir; I think so.

Q. So also does your model?

A. I think so. There may be some little errors in places that I have not detected, but I think it is correct.

Q. Do you see that fault that you speak of in the trench from Station 558 northerly? A. Yes, sir.

Q. You see it there? [295]

A. Yes, sir; I see it plainly.

Q. Just describe it so his Honor will be able to identify it if he accepts our invitation to go and see it.

A. It is evidenced there by fine laminations of the rock, sheeting, parallel fault movement, and of course there is not any gouge there. The gouge is gone there at the surface, but that is what you see there, and it is only just a few feet, it is not more than twenty-five or thirty feet down to where you can see the gouge below on the No. 2 tunnel level.

Q. I am speaking now of the trench, let us stick to one thing at a time.

A. Yes, sir; that is what you see, some dark quartz.

Q. Some dark quartz? A. Yes, sir.

Q. Isn't it true that you see that banding of continuous quartz from the northerly end of that trench clear down to the southerly?

A. It is not, except on the edge of the quartz where there has been a little sloughing off, you

(Testimony of Albert Burch.)

can see along the strike of it, going down on the dip.

Q. So that there, Mr. Burch, we are at a point of disagreement in observation between the witnesses on the two sides? A. I do not know.

Q. As a matter of fact, you were unable to trace continuous quartz through that trench down to its southerly end?

A. Yes, sir, I could not; not unbroken. [296]

The COURT.—That is the point right north of the gulch.

Mr. GRAY.—Yes, sir; it is the point which I want to identify for your Honor on our map. It is this trench here in which we show continuous quartz.

A. It is the same one, your Honor, shown in white on Exhibit No. 29, with the blue line down it.

Q. Mr. Burch, you did find quartz in the trench which has no number upon that map. Let me get the number. It has no number on ours. It is marked G'.

A. Well, I will put a number on, Mr. Gray.

Q. All right. Mark it G'. You find quartz in the trench G'? A. I do.

Q. You find a vein there? A. Yes, sir.

Q. What vein is it?

A. I think it is the Black Tail vein, but I am not sure.

Q. I want to mark the point G also upon there. At the northern end of the open stope will you mark that point G?

(Testimony of Albert Burch.)

A. Northern end of which open stope?

Q. Of this one just north of 554. Now, Mr. Burch, you have expressed the opinion that the Black Tail vein crosses the so-called Lone Pine No. 2 vein and is found at some places beyond?

A. I think it does.

Q. I understood you to say in your judgment it was not a very strong vein?

A. No, I did not say that. I said it is a strong vein. [297]

Q. It is weak in comparison to the Pearl vein.

A. It is rather weaker than the Surprise vein, yes, or Pearl, but it is still a good strong vein.

Q. At point 63–C, what is the size of the vein?

A. Oh, there is probably four feet there, maybe six, I can tell by looking at my notes.

Q. It is a substantial vein in any event?

A. It is.

Q. I understood you to say that in the trench along the end-line, the south end-line of the Lone Pine, the vein was of very little consequence, you don't regard it of any importance?

A. There is not any vein there that strikes in the direction of the Black Tail so far as I could tell.

Q. How many stringers of quartz did you count in there—any?

A. You are referring to the trench or to the end-line tunnel, which one?

Q. The end-line trench.

A. In the end-line trench I saw two, one of perhaps 8 or 10 inches, and the other one perhaps 3

(Testimony of Albert Burch.)

inches, but I do not think that either one of them was in place—a boulder.

Q. You did not see anything in place there?

A. Not in that trench—oh, yes, I did. Up above the pit that is sunk in the trench, that is to say, easterly of 61–C, the bedrock is exposed for a long distance.

Q. And through the cut from 108–C northerly to 4–C you have it marked in yellow upon your surface map. That represents what you believe to be the Lone Pine vein? [298]

A. The Lone Pine vein?

Q. I mean the Black Tail vein.

A. I think that is probably the Black Tail vein.

Q. Mr. Burch, you then are of the opinion that this Black Tail vein is found northerly at least to the trench G–1?

A. I think it is found in the trench G–1; yes, sir.

Q. And northerly?

A. Yes, sir; and much further.

Q. You do concede that the so-called Lone Pine No. 2 vein is found at least as far southerly as the trench north of Station 551?

A. Yes, sir; and a good deal farther southwesterly

Q. If you will just answer my questions. So that you have them there how far apart?

A. About 40 feet.

Q. About 40 feet? A. Yes, sir.

Q. Is the red that you show on the easterly side of the trench north of 558, a part of the Lone Pine No. 2 vein?

(Testimony of Albert Burch.)

A. Yes, sir; going downward on its dip, as you can readily see here. It goes partly down on its dip and partly on its strike.

Q. Whether it goes on its dip or its strike, you can see that this is part of the Lone Pine No. 2 vein? A. Yes, sir; that is correct.

Q. Yes, sir; from the southerly end of trench 558, I see you have some yellow, what is that?

A. That is a northwest vein. [299]

Q. Is it the same vein shown in Trench G–1?

A. I think so.

Q. How far is that from where you have found the quartz of the so-called Lone Pine No. 2 vein?

A. About 20 feet.

Q. What is the scale of this?

A. Forty feet to the inch.

Q. Won't you come over to this larger scale map? This working 331 was driven at your suggestion, wasn't it? A. It was.

Q. That is, this working here? A. It was.

Q. Your geology is where, upon the floor, breast or roof of the workings?

A. It is about midway up, half way between the roof and the floor.

Q. Mr. Burch, is it a fact that in that working, south of Station 331, quartz is found as shown upon Plaintiff's Exhibit No. 4? A. It is not.

Q. It is not? A. No.

Q. So, here again it is a matter of observation. You were unable to find those bands of quartz which are shown upon that exhibit?

(Testimony of Albert Burch.)

A. Not in that direction; no, sir.

Q. What direction have the bands of quartz which you found in that working?

A. A generally— [300]

Q. Let us have your notes.

A. I have no notes on it.

Q. You have no notes on it?

A. No, I have no notes on the direction of any bands of quartz.

Q. All right, let me see your notes on that working.

A. (Witness produces notes.)

Q. Where is that working?

A. That is the working.

Q. What does the red that you show represent right in the end of the working in the southeastern corner?

A. It says: "Vein in winze 6 feet below shaft, strikes north 20 degrees west, dips 45 degrees east."

Q. That is this one?

A. That is a sand winze; yes, sir.

Q. Isn't it true that in the back of that drift at the point shown in the little drift south of 331½ you find that that quartz in the left-hand side in the roof of the drift?

A. No, you cannot find anything in there, but surface quartz and debris in the roots.

Q. I want to mark it as the point B. I will mark it, the workings from 331½ to B, you say that the quartz cannot be found?

A. No, not on the left-hand side. All you can

(Testimony of Albert Burch.)

find there is surface wash.

Q. That is open to inspection?

A. All you can see is lagging now. I have to drive lagging to hold the dirt up. [301]

Q. Have you a map which you exhibited to me in San Francisco a couple of weeks ago?

A. Not in court here. I can get it for you if you wish.

Q. It was your opinion at that time, before this working was driven, that this vein passed on out in a much more nearly westerly direction, wasn't it?

A. No, it was not. It was my opinion that the vein continued substantially as it was up here on the under side of the fault, and substantially the same direction, and just why that work was turned deliberately to leave the vein, I never could understand.

Q. Does not the ten-foot detailed sketch, Plaintiff's Exhibit 4, show accurately the banding of the quartz and the position of the quartz and the position of this fault from Station 326 to Station 331½?

A. I do not think accurately, no, because in the first place, the fault, I don't think departs at 331½ at all. I think it continues until you cannot see anything but surface debris where I hold my pencil; in other words, all of the quartz that is exposed in a working from 331½ southerly is on the west side of a fault?

Q. But you did not find the quartz there?

A. I found the quartz all the way along the side,

(Testimony of Albert Burch.)

that is, the right-hand side; in fact, the working had to be turned around to get the quartz at the face, turned to the right.

Q. You did not take the course, though, of those bands of quartz? [302]

A. No, the quartz is all broken; you could not get any reliable course on the bands.

Q. You could not get it?

A. No, you could not, because the quartz is all broken and shattered. It would not mean anything, any course taken on the bands of shattered quartz.

Q. Mr. Burch, at the present time, isn't it true, that those bands of quartz, assuming that this is the face of the working south of 331½, that the bands of quartz are shown in the back as I have them sketched upon Exhibit No. 31?

A. I think that is about correct. They are on the right-hand side and not on the left-hand side as you face the opening.

Q. If they are projected to the floor, they are on the right-hand side of the drift at the floor, aren't they?

A. They would be, yes. That, however, Mr. Gray, is facing—

Q. North.

A. That is the way you look as I hold my pencil now, not facing as you look that way, but facing as I hold my pencil, which would give the strike of those bands of quartz as I hold my pencil now towards the southwest.

(Testimony of Albert Burch.)

Q. You say those bands of quartz have a strike southwesterly?

A. Yes, sir, I think so. They are very much broken and a man is foolish in saying that a broken band of quartz represents its original position, but that is the way they [303] strike.

Mr. COLBY.—Which way are you standing when you are looking at this?

A. You are standing and looking southwest.

The COURT.—At this time we will take an adjournment until 2 o'clock.

Thereupon an adjournment was taken until 2 o'clock P. M. this day, August 25, 1920. [304]

2 o'clock P. M., Wednesday, August 25, 1920.

Court convened pursuant to adjournment, present as before.

ALBERT BURCH resumed the stand for further *cross*

Cross-examination.

(By Mr. GRAY.)

Q. Mr. Burch, on your model 30, do you correctly show this red vein to the southwest?

A. Oh, practically so as near as you can get it with straight lines. You see the saw cut goes through on a straight line, and the vein isn't straight.

Q. Does it go out at Section 331 as you show it?

A. Out of that working?

Q. Out of that working, yes.

A. Yes, out of the old working that existed there at the time.

(Testimony of Albert Burch.)

Q. You haven't put on the short working which we call 331½?

A. No. In fact, the vein curves more around to the left.

Q. Suppose you put a red line on there to show where it ought to be. By the way, did you bring that map that we were talking about? A. Yes.

Q. As a matter of fact, your map will show it?

A. I didn't put anything on the map. The map was one that was supplied to me. That is about the same, I think, as it was developed.

Q. Down to the point B, just put B there if that is the point. [305]

A. That is my recollection of it.

Q. Do you correctly show the fault on its course northerly, as nearly as you can with a straight line?

A. As nearly as you can with a straight line.

Q. Well, does it run in a straight line?

A. No, it does not. There are two branches, one branch that follows substantially the footwall of the vein and the other branch goes out across here.

Q. Across this working which extends northeasterly from 65–C? A. Yes.

Q. Approximately as shown on the model?

A. Yes.

Q. I want you to come over to the map. Will you get that branch that you say turns to the east on the 200 level?

A. The branch that turns to the east?

Q. Yes. What is this—in other words, what is this blue that you have marked following the foot-

(Testimony of Albert Burch.)

wall of the vein and which is found northerly of Station 326? A. That is that branch.

Q. How far does it follow the footwall of the vein?

A. About as far as is shown there, as near as I can tell. That has all been excavated, the ground is all cut out, but you can see the wall there where it formerly existed, I think.

Q. Didn't you follow it as a matter of fact, clear up your past Station 203?

A. I didn't succeed in doing so.

Q. Have you your notes on that? Don't they show that? [306]

A. I don't think so. I thought I identified the same thing a good deal farther north. Up at the point here I think probably we have the same thing there.

Q. That is at the crosscut 202? A. 202; yes.

Q. Just run up past along the footwall of the vein and past the 103, wouldn't it?

A. Yes, sir; that is the way I have it.

Q. That is the way you have it on your notes?

A. Yes.

Q. That is that fault with 120-foot throw that you were talking about? A. That is a branch of it.

Q. You wouldn't object—you think that it extends along the footwall of the vein up past Station 103? A. I think so.

Q. On the 400 level, that is this one here, you find it on the footwall of the vein much farther up than you have shown it on your map, don't you?

(Testimony of Albert Burch.)

A. Not on the level. I can't tell much about it down on the level, but I climbed up in the stope and in the stope I thought I could see it on the footwall of the vein at a point about 30 feet northeasterly from where it was shown striking the footwall on the level; in other words, up about here.

Q. Didn't you find it clear up past Station 170–A?

A. I did not.

Q. Did you look for it there? [307]

A. Yes, I looked at that point.

Q. Your notes don't show that there?

A. No, my notes don't show it on the level, beyond where it is shown there.

Q. Where does it cross the No. 1 Crosscut tunnel?

A. I am unable to say.

Q. Well, this vein—this fault with over 100-foot throw, you can't find in that crosscut?

A. I can't tell where it is. This branch turning off to the left, which I consider the same one—

Q. I am talking about the one that turns off here and follows the footwall of the vein.

A. Which I don't consider the same one.

Q. I don't care what you consider it. You are not able to find it in No. 1 tunnel. A. I think not.

Q. No. 1 crosscut.

A. I don't know where it is there.

Q. You say you have not been able to find it?

A. I haven't looked for it.

Q. You didn't look for it? A. No.

Q. Of course, I don't suppose you correlate that

(Testimony of Albert Burch.)

with the little fault that we were talking about this morning, Mr. Burch?

A. Oh, no; that has a different strike and a different dip.

Q. Now, then, with reference to the fault in—where does that fault go southerly from the face of the 331½ working? [308]

A. I can't tell you. It disappears underneath the wash there, and what course and strike it takes from there, I do not know.

Q. Where do you find it in the workings from the incline on the Surprise vein?

A. It is possible that this may be it near Station 205. I don't know; didn't see the working in the Surprise vein; I wasn't there at all.

Q. I say from the Surprise vein incline.

A. Yes, on the No. 4 level.

Q. On the No. 4 level?

A. It shows on the No. 4 level where I hold my pencil here near Station 81–C.

Q. What branch is that?

A. That is the main one.

Q. That isn't the one that turns and branches.

A. A branch of it turns off and follows the footwall.

Q. Where does the other branch go?

A. Presumably it keeps on as it does on the level above.

Q. And the No. 3 level shows up the 2 branches?

A. Only one branch exposed there.

Q. Which one is it?

(Testimony of Albert Burch.)

A. That is the main fault.

Q. That is the one you said followed around, isn't it? A. Oh, no; not on number 3.

Q. Aren't you able to follow through on No. 3 past Station 109? A. No, sir. [309]

Q. Is there a gouge there? A. No, sir.

Q. There is not? A. No, sir.

Q. You are sure of that, are you?

A. Yes, sir. [310]

Q. Now, I would like to take you to the 10-foot detail map, this main branch of this fault with a throw of more than 100 feet. Where is it on that level of those workings?

A. It is not shown here. We find the main part of it in the crosscut—near the face of the crosscut easterly from station 320-A.

Q. That is near the face?

A. Near the face, yes, and it crosses near Station 326. It crosses the bending in a different direction from the gouge which is shown upon Exhibit No. 4.

Q. Do you find a gouge crossing the working from 326 to 320-B at the points shown on Exhibit 4?

A. Yes, but not in the direction.

Q. What is the course of that gouge according to your own notes, if you will just lay those before his Honor. I think this is very important and I want to direct your attention to this particular place.

A. The notes show for themselves.

Q. Now, Mr. Burch, don't you find a gouge near the west wall, west of Station 326, passing in a southwesterly direction and crossing the crosscut from 320-A? A. No.

(Testimony of Albert Burch.)

Q. There is none such there that you observed?

A. No.

Q. The only one that you observed is the one which—you call it the one which I will mark on Exhibit 4 as "B" with a blue "B" with the gouge which I have marked with a blue "B'," and a little crosscut east of 320–A? [311]

A. Yes, it is pointed right straight off.

Q. What is the strike of the one at B?

A. Substantially south.

Q. What is the strike of the one at B'?

A. Substantially north.

Q. You did not find one at the point C?

A. No, nothing of any importance.

Q. No gouge at all across that?

A. I would not say that there is no gouge at all. There may be a little break in there.

Q. What is the course of the gouge northeasterly from B' to Station 327?

A. Substantially as shown upon Exhibit No. 4.

Q. Does it bend out about the point B and run southerly?

A. No, it bends out about Station 326.

Q. Do you find any gouge crossing the crosscut on the—what crosscut is that?

A. The main No. 2 tunnel.

Q. The main No. 2 crosscut as shown on Plaintiff's Exhibit No. 4? A. I do not.

Q. Now, Mr. Burch, do you find the gouge passing southeasterly through Station 320? A. I do.

Q. Do you find that any place further to the south-

(Testimony of Albert Burch.)

east? [312] A. Ido not.

Q. Is that a postmineral gouge?

A. I think it is.

Q. A branch of this 100-foot fault?

A. I don't think so. I think it is the gouge following the footwall of the Black Tail vein. You will find practically everywhere through the Black Tail vein, through that gouge. I think it is a postmineral gouge. I think it is a movement along the footwall of the Black vein. Then the main fault is later than that and naturally would displace it. You would not see the continuation of it further to the south.

Q. In other words, you think that postmineral gouge is faulted by the 100-foot fault?

A. Yes.

Q. So that we have two ages of postmineral faulting? A. Yes.

Q. Did you observe that anywhere else?

A. That faulting along the Black Tail?

Q. No, from the faulting of this northwest fault by the northeast fault.

A. Yes, I can show you that.

Q. Whereabouts?

A. Those faults run northerly and southerly. [313] (Witness having moved over to defendant's map.) In the southeastern part of the workings upon the Black Tail vein within the Black Tail claim, the fault which follows the footwall of the Black Tail is cut off by a fault having a northeasterly strike and is displaced a distance of about 50

(Testimony of Albert Burch.)

feet to the southwest—60 feet.

Q. You think this fault away down there is the same big 100-foot fault that you have been speaking about up on the Pine claim? A. No.

Q. I asked you if you knew any place where this 600-foot fault faulted this earlier fault which you say is along the Black Tail footwall?

A. I did not understand you.

Q. I asked you if you could point to some place where one fault faults the other.

A. That is the only place where it would be possible to see it that I know of.

Q. Does this map Exhibit 38, just west of Station 336, correctly show the position of the ore and this fault that you speak of?

A. Very closely, I think.

Q. Now, that fault is the main fault, having the throw of 120 feet, the one which you have pictured on this exhibit, is it?

A. Yes, sir; I believe it is, it branches just west of 336 here.

Q. Which is the main branch?

A. The main fault continues on northerly in its general [314] direction. The other followed for a short distance the footwall of the vein, that footwall being there first.

Q. The footwall being there first?

A. The footwall was there first and the fault afterwards.

Q. It crosses the Lone Pine No. 2 tunnel. How wide is it as it passes that Lone Pine No. 2 tunnel?

(Testimony of Albert Burch.)

A. Two or three inches of gouge.

Q. Two or three inches of gouge, and you think that is a 100-foot fault?

A. I think so; yes, sir.

Q. What is the movement of that fault, what is the horizontal movement?

A. The horizontal movement is very slight, probably not more than 120 feet.

Q. And the vertical movement?

A. About 120 feet, on the dip of the fault.

Q. There is not any place in the property where you can actually show that displacement, is there? That is the result purely of the application of your theory with reference to it?

A. No, that amount of throw brings 2 veins back into the position that they originally occupied.

Q. That is assuming that this, which is found in the trenches and near the southwest corner of the fault in the Lone Pine No. 2 vein is identical, or was identical. A. Yes, sir.

Q. Now, the hillside going southwesterly from those trenches is well exposed, isn't it?

A. Going southwesterly below those trenches?

Q. Yes, sir. [315]

A. No, there is a lot of surface wash. You are almost at the edge of the gulch when you get down to the railroad track, and when you cross the railroad track, which runs about where I am passing my finger now, when you get beyond that, then you are under wash, debris.

Q. Mr. Burch, does this fault that you speak of

(Testimony of Albert Burch.)

fault the Pearl-Surprise vein at any place?

A. I doubt it, sir. I doubt very much whether it does or not.

Q. What becomes of it?

A. I think it moves up on the Pearl and Surprise vein, there is very heavy gouge along the Pearl and Surprise throughout that section.

Q. It moves up on it. A. Yes, sir.

Q. In other words, it faults in your judgment, the Lone Pine and the Black Tail and then runs over to the Surprise and runs along the Surprise.

A. Yes, sir; in other words, that block of ground in there has moved.

Q. Your conclusion is based solely upon the fact that you could not find where it faulted the Pearl-Surprise vein, isn't it? A. No.

Q. Well, what else?

A. The heavy gouge along the Pearl and Surprise vein on the hanging wall side of it.

Q. That heavy gouge on the Pearl-Surprise vein continues far north of there, doesn't it? [316]

A. Yes, sir; but not so heavy.

Q. Where does that begin to get so heavy—in other words, north and south along the Pearl-Surprise vein you find this heavy gouge?

A. You find the gouge on the footwall side, and in certain sections you find it on the hanging-wall side also. You find sometimes three gouges, one on the hanging, one on the foot and one on the middle. The vein is accompanied by gouge throughout the entire extent.

(Testimony of Albert Burch.)

Q. Now, I want any reason that you can give other than that you cannot find that vein faulted while this 100-foot fault goes over and moves along the Surprise vein.

A. That is the best reason that I can think of.

Q. Does it fault the Surprise vein by 100 feet?

A. I don't think so.

Q. Did you move it at all, just went off and played out along the course of this vein, did it?

A. Followed it.

Q. Followed it? A. Yes, sir.

Q. The movement that took place up in the Pine, did not that take place down in the Surprise vein, too?

A. Along the hanging-wall side of it, yes, sir.

Q. You find evidences of a 100-foot movement there?

A. There is evidence that would indicate as much as 100 feet or more.

Q. What is that evidence—just the gouge?

A. The extent of the gouge; yes, sir.

Q. You have it or one of its branches, in fact, you [317] have it running along what you call the Pearl-Surprise vein for some distance on the footwall, haven't you? A. Yes, sir.

Q. Then you have it following along the Surprise-Pearl vein, haven't you?

A. What was the first part of this question?

Q. It follows in part the footwall of what you call the Lone Pine No. 2 vein?

(Testimony of Albert Burch.)

A. Yes, sir; that is right, for a short distance, just a spur.

Q. You found it in one place running up two or three hundred feet, didn't you? A. No.

Q. Go back and see now; how far did you see it?

A. I found it at Station 103, and I think that is probably the same crack at that point where you hold your finger.

Q. West of this point, how far did you find it out on the No. 2 level, following the footwall of what you call the Lone Pine?

A. I think that is about 150 feet. I will scale it.

Q. I think that is good enough. Then you find it later in your judgment following down southerly along the Pearl-Surprise vein?

A. That is the only thing that I can see.

Q. Has it made a right angle turn there?

A. No.

Q. It has not? A. No.

Q. All right. As you have it drawn there, it must fault [318] the discovery vein, does it not?

A. No, I don't know whether it does or not.

Q. A great fault like this, you cannot lose readily and easily, can you?

A. Yes, great faults like this—this is not much of a fault, a 120-foot displacement don't amount to very much of a fault.

Q. In geology and mining it does, doesn't it?

A. No, and furthermore, the common way in which those faults end is to spraddle out into branches, dissipate themselves in that way, and the

(Testimony of Albert Burch.)

first point that we see is the point to which you have called my attention several times.

Q. In other words, this part of the country has fallen down 100 feet from the country all around it?

A. No, I did not say that, but I say that this section over here, relatively to the other, moved up.

Mr. GRAY.—That is all.

Redirect Examination.

(By Mr. COLBY.)

Q. Mr. Burch, it is quite a frequent occurrence, is it not, when a fault of any considerable magnitude approaches a large strong vein that it very frequently merges with it on one wall or the other, that motion is taken up along the wall of the vein?

A. In part, because you have there a pre-existing fissure. [319]

Q. That is the reason, that it reaches a plane of weakness. A. A plane of weakness; yes, sir.

Q. And the great motion is taken up along that plane of weakness? A. Yes, sir.

Mr. COLBY.—That is all.

Recross-examination.

(By Mr. GRAY.)

Q. Just one question. Did I understand you to say that you thought this was faulted again, this vein, near the southwest corner, say, faulted again over at the railroad?

A. I could see a *plain* of faults right where I hold my pencil now, which projected three or four

(Testimony of Albert Burch.)

feet, and the vein projected three or four feet would intersect on to the railroad track, and I think that fault has probably displaced that vein. I do not think this fault has any considerable throw at all.

Q. Why didn't you find it on the other side of the cut—that cuts into solid rock, doesn't it?

A. It cuts largely into solid rock.

Q. Did you look for it on the west side?

A. I did not look for it on the west side.

Q. Did you look for it on the east side?

A. Yes, sir, I found it on the east side.

Q. But you did not find it on the west side?

A. I did not find it on the west side.

Q. What you call this main fault, must, if continued in [320] its direction, fault the discovery vein, must it not? A. Yes, sir.

Q. And yet you do not find any evidences of it?

A. The only fault that I found up there is a little one there that does not displace it, but just a short distance.

Q. Well, how much? A. Oh, two or three feet.

Q. That is another fault. Did you say that in your judgment the Black Tail vein was found in the working from Station 64–C?

A. In my judgment it is; yes.

Q. What do you base that judgment upon?

A. It has the same character as the Black Tail vein, it has the quartz of considerable width ranging from 1 foot up to four or five, and it has the same gouge that accompanies the footwall of the Black Tail vein, it has the same strike and the same dip

(Testimony of Albert Burch.)

and there are very few northwest veins anywhere in the entire territory here, and it is the only thing it will match up with.

Q. Now, how far is that from the nearest exposure of what you concede to be the Black Tail vein?

A. What I think to be the Black Tail vein is about 30 feet, I guess, 25 or 30 feet on the opposite side of the fault.

Q. Just show us where that is on this level.

A. You cannot see it on that level.

The COURT.—I think he testified to that this morning.

Mr. GRAY.—I did not ask him about this, your Honor. I am talking now of what he calls this vein on the other side. [321]

A. It is about 60 feet to what I think is the Black Tail vein, on the opposite side of the fault.

Q. On the opposite of what you call the Lone Pine? A. Yes, sir.

Q. You also said you thought the same vein was found up in the Pearl tunnel at Station 92–C?

A. Yes, sir; I did.

Q. How many hundred feet away is that?

A. About 340 feet.

Q. The only reason you say that is because you have a northwest fissure with some quartz and some gouge? A. A good vein.

Q. Northwest vein?

A. A good northwest vein, and they are very rare. I do not know of but two, one is the Black

(Testimony of Albert Burch.)

Tail and the other is the Surprise, and we know that this must be the Black Tail.

Q. You expressed the opinion that the discovery vein might be shown in the Pearl tunnel and in the working at 324? A. That is possible.

Q. Do these two that you have tried to hook up there have the same strike? A. Not exactly; no.

Q. Do they have the same dip?

A. My recollection is that they have the same dip. I can look in my notes and see, but there is nothing else intervening between. I wouldn't say positively that that is it. I don't know.

Witness excused. [322]

Testimony of Arthur Lakes, Jr., for Defendant.

ARTHUR LAKES, Jr., a witness called on behalf of the defendant, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. Where do you reside, Mr. Lakes?

A. Spokane.

Q. What is your occupation?

A. Mining engineer.

Q. How long have you practiced this profession?

A. Thirteen years, with the exception of two years when I was in the service of the United States.

Q. What has been your experience—in the first place, where did you receive your education?

(Testimony of Arthur Lakes, Jr.)

A. I went to the Colorado School of Mines, from which I did not graduate.

Q. I believe you are the son of Professor Lakes, who was an eminent geologist? A. I am.

Q. After you left college, what was your experience?

A. I was a miner in the gold veins at Central City for about a year, surveyor and assayer in Haley, Idaho, for about a year and a half; manager of some small properties in that district for another year; engineer for the Colorado Gold Dredging Company, subsidiary of the general Development Company of New York, for about a year.

Q. Without going into detail, what mining districts have you been in and engaged in the practice of your profession? [323]

A. I have been in practically all of the western states, in Alaska and in Mexico, and have examined the mines in these states; also in British Columbia, where I was managing and consulting engineer for the Weimer Wilcox Development Company up to 1917. Since August of 1919 I have engaged in the general practice of engineering in Spokane.

Q. Are you familiar with the Republic Mining District? A. I am.

Q. Have you examined the group of mines here particularly in controversy? A. I have.

Q. And have you spent considerable time in the course of your examination? A. I have.

Q. About how much time have you spent in detailed examination?

(Testimony of Arthur Lakes, Jr.)

A. Off and on, about eleven months. The scope of my examination was to locate and note the structural features and make the exhibits presented in this case.

Q. You had a good deal to do with the preparation of these exhibits, did you not? A. I did.

Q. The actual surveying, as I understand, was largely done by someone else?

A. It was, with the exception of some few little minor points, tied into the other survey.

Q. But as far as the representations of the geological conditions are concerned, you had supervision of that portion of the work? [324]

A. I did.

Q. Now, in regard to this model here, what did you have to do with this model?

A. I made this model; that is, I directed the work on it. It is made according to the survey. The stopes depicted in red are measured as near as possible as conditions permitted. The backs of some of the stopes were approximated, as they were not available.

Q. Without going into detail, this is substantially accurate? A. Substantially accurate.

Q. Is as substantially accurate as you can get with such a small scale, is it not? A. It is.

Mr. COLBY.—We offer the model and various maps.

Mr. GRAY.—They may all be received.

(Defendant's exhibits introduced up to this point

(Testimony of Arthur Lakes, Jr.)

were thereupon admitted in evidence and made a part hereof.)

Q. Now, Mr. Lakes, I will ask you to come to the map, first, taking the surface map and pointing out to the Court what you found in the way of vein exposures in the vicinity of the discovery and extending through the discovery generally as represented on this map Exhibit 26.

A. In the vicinity of the discovery there are two at least quartz veins, the one passing through the central part being about 14 or 15 inches wide. Southwest from the discovery 10 or 15 feet there are 2 or 3 veins coming together, making a total width of quartz in excess of 5 feet. Following in this direction—

Q. When you say "this direction," which do you mean?

A. Following the discovery towards 590, 591 and 598, a quartz stringer and vein was carried all the way. This work was done previous, in March of this year. Cross-surface trenches indicated a vein running in this direction which is exposed on the cliff. By careful examination of this part of the hillside—the part southwest from the discovery down to about 543–C where it is exposed indicated a number of quartz veins running in a northeast-southwest direction. These veins were correlated as to their strikes and afterwards the trenches depicted in the vicinity running in the vicinity of 543–C, were run. From a point about 20 feet southwest from 543–C the vein is exposed on a cliff, and

(Testimony of Arthur Lakes, Jr.)

was followed by surface trenching to the west side-line where it is in excess of 2 feet wide.

Q. Was there a continuous exposure of quartz from the discovery following down the trench that you have last indicated to the side-line?

A. There was a continuous exposure of quartz.

Q. I would like you to describe just briefly the cliff that you have mentioned there. What is that cliff composed of?

A. That cliff is composed of country rock and on [326] that cliff are a number of veins which link one with the other, and it is very abrupt. This vein can be followed down along what would probably be its dip and strike.

Q. Now, extending in the other direction from the discovery to the east side-line, what did you find?

A. From the discovery to the east side-line we find continuous quartz to a cut northwest from Station 581, where the streak of quartz that was followed is offset to the north and followed on the left-hand side of the cut down to the crosscut northeast from 581, where for a distance of about 20 feet the vein is represented as a fissure, with the quartz in small reticulating veins about the size of my finger, or smaller, but the fissure is well shown. From this point through the east side-line near pint 7–C there is a defined quartz vein.

Q. Is there any question, Mr. Lakes, about being able to follow from the discovery cut down to the east side-line the continuous quartz if you have the

(Testimony of Arthur Lakes, Jr.)

opportunity to develop it; I mean had time enough to go in there and follow out those seams?

A. I don't think so. I think we could follow continuous quartz the whole way.

Q. What can you say generally about this system of veins in here with relation to one another?

A. These veins appear, many of them, to link one with the other, and occasionally there are joining veins having a course southeast. But the general trend of all the veins in this vicinity is northeast and southwest, the linking [327] veins, the few that go in a southeast direction, do not appear to extend to any great length, but appear to start from one and branch and merge into another. One link will come up against a vein and another might be a little ways off going into another vein, but if it is followed out they usually merge in with the northeast-southwest course of the veins, the strike of the veins being predominently northeast and southwest.

Q. I will call your attention to an exposure near 44–C marked Tunnel there. What do you find in that?

A. In tunnel 44–C is a vein of from 10 to 14 inches of quartz standing nearly vertical, in some places banded. This vein has a northeast and southwest direction.

Q. Substantially parallel?

A. Substantially parallel to one indicated at the discovery vein. I would say further that in cut 520, 551—this cut is just north, the end of it, of 551, there were these other veins across, all bearing the

(Testimony of Arthur Lakes, Jr.)

same general course and strike described.

Q. Calling your attention to 13–C, what exposure do you find there?

A. 13–C is a large—what a practical miner would call a quartz blow-out. The strike is rather hard to determine. There are some seams that appear to be going in a southeasterly direction. However, in the cut to the north of 13–C there is a good exposure of quartz, and in a cut running southwest from 13–C was shown about 4 feet of quartz, indicating that the probable course is northeast and southwest. [328]

Q. This trench which is to the north of 13–C was cut in through the wash to bed rock, was it?

A. It was.

Q. So that it would have exposed any other quartz showings along the length of that trench?

A. It should.

Q. Now, coming to the main exposure here, labeled "Lone Pine No. 2 Vein," give, in a general way, the characteristics of that vein and what your observations were as to its continuation.

A. The Lone Pine No. 2 vein as indicated by the open stopes and the croppings between them on the surface is a strong vein running northeast-southwest. It is not exposed on the surface in the immediate vicinity of the east side-line of the Lone Pine claim.

Q. Why is that?

A. Well, there is wash there, and it is exposed in a stope immediately below.

(Testimony of Arthur Lakes, Jr.)

Q. It is coming down close to the gulch there, isn't it?

A. This is in the gulch here. This wash extends to the west under the gulch.

Q. In fact, the intersection of the vein with the side-line would be practically at the creek.

A. Well—

Q. In the creek bottom, I mean.

A. Yes, in the creek bottom. The workings of it [329] if brought up there would cause the water to go into the mine. Coming southwest on the Lone Pine-Surprise vein, at about Station 544, through 543, and thence to a cut which is run from 558, the vein is exposed by a trench. This trench shows that the banding, as possibly indicated on the surface in a series of small ridges, bears a northwest course as indicated on the trench. [330]

Q. That is upon the bending direction, or more in this direction? A. Yes.

Q. In what direction is that?

A. More in a north, 25 or 30 degrees direction.

Q. East direction?

A. Northeast. At this cut there is a large exposure of quartz which appears to be cut off abruptly. South from this large exposure of quartz there is some broken up quartz material.

Q. I will ask you to *go the* model and point that out and confine your testimony as far as possible to that exposure as shown upon the model.

A. Following from the point on the model, near 664–C down to the cut No. 543–C, the vein is opened

(Testimony of Arthur Lakes, Jr.)

by a trench depicted by this red. The course of the trench is parallel with the apparent bending of the vein as indicated by the weathering, whereby there are a number of little ledges, that point more to the northeast than the course of the trench would indicate. Following from the intersection of this cut, to cut No. 558, a cut runs northerly from 558, following from the intersection of this cut with the Lone Pine No. 2 vein is some quartz that appears to belong to the Lone Pine No. 2 vein.

Q. What is the character of this quartz?

A. The character of that quartz is—it is typical of the quartz mined through the district. [331]

Q. That is the upper end of the cut?

A. Yes, sir.

Q. Then what do you reach?

A. Then there appears to be a break in the middle of the tunnel.

Q. In the tunnel?

A. In the middle of the cut by from about one-third of the distance, then the cut appears as crushed up quartz, breccia. At the southern end of the cut there appears a little vein about 14 inches wide, which extends in a southeasterly direction, and is again shown in a small cut below.

Q. What is the appearance of that small cut below?

A. The possible extension of this south vein.

Q. I mean what is the exposure in the cut below, if you recall? A. You mean vein?

Q. Yes, what does it look like?

(Testimony of Arthur Lakes, Jr.)

A. It looks like a quartz vein.

Q. What is its width?

A. Its width in the cut below is about 6 or 9 inches.

Q. And its strike and dip?

A. Strike is southeast and dip to the east.

Q. Now, coming into the No. 2 level here in this same vicinity, what do you find as you go on that level? A. On the No. 2 level?

Q. Tunnel level. Going in straight from the [332] mou*nt* of No. 2 tunnel, describe the condition that you found in this general vicinity.

A. No. 2 level from the mouth of 65–C is a crosscut through country rock. Across this are a few gouge streaks and at a point about 20 feet in from the south is a small quartz vein with a strike apparently north, but it only shows on one side underneath the timbers and I could not get any definite course. At 64–C there is a gouge streak crossing the tunnel. Running from this gouge streak—

Q. That is indicated by blue on the model?

A. As indicated by blue on the model. In a southerly direction is some gouge which appears to merge with this through the upper part marked 65–C. A tunnel from 64–C to 326–C cuts through quartz for a considerable part of the way. In this tunnel crossing it is a gouge seam. A little crosscut is run from 65–C in an easterly direction and near the face of a brecciated quartz with a dip to the easterly on the hanging wall of what is strong gouge. Following from Station 326 through 330,

(Testimony of Arthur Lakes, Jr.)

331, the tunnel is blank for about 30 feet, and then the gouge appears following in a southerly direction to the end southeast from Station 334. On the foot of this gauge—

Q. Southeast?

A. Southwest from Station 334. On the foot of this gouge appears quartz. This quartz is brecciated in places. [333]

Q. What quartz is that in your opinion?

A. In my opinion that quartz is the continuation of the quartz found in the cuts run by us through 576, 575, 574, and the little inclined winze to the north, 576.

Q. Has it anything to do with the No. 2 vein?

A. In my opinion it is part of the No. 2 vein, it is the southwest extension of the No. 2 vein.

Q. Now, describe the exposure in this work that you have just mentioned, the vein exposure?

A. In cut 574, the one farthest to the southwest the quartz is exposed there about 48 inches wide. In 575, it is exposed about 5 feet and then there is some country rock for about 3 or 4 feet with about 18 inches of quartz to the south, and in 576 the quartz is about 5 feet wide. In the inclined winze the quartz is partially covered by a drift. It turns on the right-hand side of the winze, however.

Q. Have you any reason to believe that it diminishes in width?

A. No, I believe on the contrary that it would maintain the same width, or approximately the same width if we could have time to expose it.

(Testimony of Arthur Lakes, Jr.)

Q. What difficulties did you have—you directed that work, as I understand it?

A. The difficulties we had in the incline drift, or the inclined winze was the wash from the gulch, and [334] the fact that it was rather hard to handle.

Q. You could not use machines there?

A. No, we had to dig.

Q. Nor couldn't blast there?

A. No, we had to dig under more or less difficulties.

Q. Had to do it all by hand? A. Yes.

Q. Now, have you a sample from any one of these cuts, that has been assayed?

A. I took a sample from about 2 feet of quartz at cut 575. This is this cut here.

Q. That is the second cut from the southwest?

A. Yes.

Q. And have you that return here with you?

A. Yes, I have.

Mr. COLBY.—We will ask that that be marked as the next exhibit in order, and we will offer it in evidence.

(The assay report admitted in evidence and marked Defendant's Exhibit No. 32.)

Q. What is the return from that in gold and silver and the total?

A. The return from that in silver is 9.7 ounces, 56/100 gold, and total value at $1 per ounce for silver, $21.27.

Q. And that cut is how far from the side-line,

(Testimony of Arthur Lakes, Jr.)

where the vein crosses the side-line?

A. That cut is about 25 feet. [335]

Q. Now, I see a little yellow winze here in the vicinity of 64–C. Will you describe the conditions as you found them in that vicinity? Is there a winze that is apparent to the eye now?

A. There is a little tunnel and below, running from this tunnel, is a hole filled with water.

Q. And what did you see in that stub running out above?

A. In the face of that is about one inch of quartz on the footwall dipping to the northeast, striking southeast. This quartz is about one foot in face and about four inches—

Q. Do you mean one inch?

A. One foot, and about four feet wide in the vicinity of 64–C.

Q. What is that exposure, in your opinion?

A. In my opinion it is the continuation of the Black Tail vein to the north of the Lone Pine-Surprise vein.

Q. Did it have the appearance of being quite a substantial vein? A. Yes.

Q. Did you find any other exposure further to the north that you could correlate with that?

A. In the Pearl tunnel at 92–C, there is an exposure of quartz 12 to 14 inches wide with gouge to a considerable extent.

Q. In a general way, what is the strike and dip [336] of that exposure?

A. The strike and dip of that exposure cor-

(Testimony of Arthur Lakes, Jr.)

responds generally with the strike and dip noted at 64–C. There is a little stub going out here west from point 322.

Q. What did you see in that?

A. With relation to the vein under discussion, the face of that stub is in a little gouge which apparently indicates that it is on the hanging-wall side, or on the hanging-wall of the vein exposed at 92–C.

Q. Now, continuing out in some of these workings here, the working that passes 340 there, out towards the end, to 342, just describe what you saw in there?

A. In the vicinity, or at 340, there is about 2½ feet of quartz which has a southeast course. Following it south, it narrows down considerably until opposite 341 it is a small stringer and at a point just a little north of Station 342 it appears to go out into the left wall of the tunnel. From 341 going on to the branch of the tunnel, pointing more easterly, there are scattered little bunches of quartz apparently having no continuity.

Q. And beyond that point 342, do you find a vein there?

A. No. A couple of cross-faults.

Q. Now, going down to this winze which starts near point 340, what did you find in that winze and in the forked workings, that extend out from the point [337] of this winze, through point 349, and 350.

A. I followed—in the winze on the north side ap-

(Testimony of Arthur Lakes, Jr.)

peared to be cut off—well, about 10 feet down the winze. Following up the winze, following a slip, a steep dip. At the bottom of the winze this slip continues in a northwest direction across this tunnel, this tunnel continuing northwest from Station 343, and has caved in below at the time that it was run.

Q. It opened up into the wash, did it?

Q. Yes, wash that caved up to the surface. At between 349 and 350, there appears a little quartz.

Q. About what dimension?

A. Oh, this quartz was five or six inches wide. It was very illy determined, merged into the country rock. This strikes substantially at that point there with the quartz shown in the level above at 340. Northwest from 350 this tunnel apparently again struck that mud. From that point into the face I could not testify from actually having seen it because at the time I made my last examination it was not mucked out.

Q. Who gave you the information, then?

A. Someone else gave us the information that is on there.

Q. Now, going up to the hill here, what did you find in this trench that is covered yellow and on out to where it forks and the tunnel goes underground towards the Black Tail claim?

A. The trench running along, 557, a little [338] to the northwest of 557, to and through 108?C, there is a good exposure of quartz from the northerly end up to about 108–C. Then this quartz continues on

(Testimony of Arthur Lakes, Jr.)

narrowing to less than a foot. Following this cut through to 62–C, from a point about 40 feet southeast from 108–C, both branches of the cut are in wash. A tunnel is driven from the easterly branch which follows along quartz for a short distance.

Q. And is there any quartz showing in that tunnel beyond?

A. The quartz appears to cut out a short distance in the tunnel on the right-hand side, and from the examination that I gave of this tunnel, I did not see quartz that could be classified as being of importance. A few little stringers that I did see in the immediate vicinity appeared to strike more to the northeast and southwest than to follow the course of the tunnel. These stringers were very flat and the face of the tunnel was very much broken up.

Q. Could you trace the Black Tail lode into the Black Tail ground—where did you first observe any indication of the Black Tail vein on the surface?

A. Going southerly on the Black Tail claim at Station 63–C there is an exposure of quartz. From there on to the south the quartz—this is exposed in a little cut. From there on to the south the quartz is exposed by cuts and on the surface, particularly the open stope near 38–C. And from there by cuts and surface [339] exposures of approximately 150 feet more or less.

Q. Will you describe the vein indications that you found in the vicinity of Station 231?

A. At Station 170–C there is a trench which is

(Testimony of Arthur Lakes, Jr.)

on the Black Tail vein probably. The Black Tail vein is again exposed in the crosscut tunnel, 202, 231, as a vein dipping easterly but narrowing down to less than 2 feet in width, the end of it being covered with muck. It is impossible to determine the exact width at the exact end depicted on the model in yellow. At 231–C there is a cross-vein following a north—well, a vein going almost east, and a little north of east, which stands vertically, and apparently joins the Black Tail vein under the muck.

Q. Have you made a study of the Black Tail vein so you can give us any points of distinction between that portion you have just described and your Pine No. 2?

A. I notice that along the Black Tail vein there appeared to be fairly continuous gouge along the footwall line, which is true through these workings, the Black Tail workings; again true in working at 64–C, and again evident at the exposure of the vein at 92–C. The Lone Pine No. 2 vein does not appear to be as much followed by gouge as does the Black Tail. There is gouge, of course, at places, but it does not appear to follow as uniformly. [340]

Q. How about the No. 4 vein?

A. No. 4 vein has an occasional gouge, but for the most part was rather tight within the wall.

Q. And these other parallel cross-veins?

A. They were tight and very seldom any indication of gouge. Of course they were on the surface.

Q. Those that were cut in No. 1 tunnel.

(Testimony of Arthur Lakes, Jr.)

A. Those that were cut in No. 1 tunnel were all tight veins, that is, by that word I mean that there is no parting between the vein and the country rock.

Q. That seems to be, then, a general characteristic of the northeast-southwest vein system.

A. It would appear to be.

Q. And the Surprise vein.

A. The Surprise vein which is a northwest-southeast of the northwest-southeast system is a very strong fault in the vicinity where it is followed along No. 3 level from 103–C to beyond north of 107–C; also where it is exposed on 4 near 206, and where it is again exposed in the Black Tail tunnel near Station 201.

Q. Did you notice any distinction in quartz characteristics between the Black Tail and the Pine No. 2 vein, from general observation?

A. Generally, I would say that they appeared to be very much alike, but the banding in the Lone Pine appeared to be more prominently shown than it did in the Black Tail quartz. Of course, there are occurrences where it would be very hard to tell the difference between the two quartz.

Q. That is true generally in the veins of the district, is it not? [341] A. Yes.

Q. What, in your opinion, is the relation between this exposure of vein that you have described in these cuts out here that pass through 576–5 and 4, to the No. 2 vein?

A. I believe that the vein exposed in cuts 574–5

(Testimony of Arthur Lakes, Jr.)

and 6 and the incline winze extending northeasterly, is the southwest extension of the Lone Pine No. 2 vein, as it is exposed between the Stations 326 and where it is shown at the northeast end of No. 2 tunnel.

Q. What leads you to believe that?

A. Well, the fact that the general strike of the quartz vein opened in these cuts and the ore stoped in the Lone Pine No. 2 stopes is nearly the same; that the change along what is clearly a fault plane is relatively little.

Q. What is the condition of the quartz along that fault plane?

A. The quartz along the fault plane appears to be much brecciated, which differs from the condition of the quartz generally in Lone Pine No. 2 vein, and from the quartz exposed in the surface cuts.

Q. Is that an unusual condition where a fault passes through a vein?

A. You would expect some brecciation.

Q. Can you compare the appearance of the quartz that you get near 331 to the southwest along that wall where it is shown on the right-hand side, and the quartz that you see down in this incline?

A. The quartz that you see down in this incline is white, while it has a number of black stains through it. [342]

Q. What is its general appearance to the eye before you break it up?

A. It has a dull, whitish color, the quartz of this vein here.

(Testimony of Arthur Lakes, Jr.)

Q. Is that broken at all, in that portion?

A. No, it does not appear to be broken except that we were in the wash and there were only chunks taken out.

Q. What relation to the vein did that quartz have that you find underneath there, is that the top of the vein?

A. That would be the top of the vein. If the wash was taken away it would be the surface exposure.

Q. It would be the natural outcrop?

A. Yes, sir.

Q. And the same would be true of the exposure at 331. A. Yes, sir.

Q. Now, is there anything that occurs to you, as you are more familiar with this than I am, that I have omitted in my questioning that you would like to tell the Court, that has any bearing on the case?

A. Only, except that in the underground workings in the vicinity of the discovery vein, that the strikes of the veins appear to be predominantly northeast and southwest; that in the tunnel along No. 4 vein and in the plural tunnel which crosses the western side of Lone Pine claim, there appear to be very few fissures or seams running in a southeast direction, with the exception of the vein at 92–C, and exposure of the Surprise vein at the mouth of the Pearl tunnel.

Q. There are some workings here marked in white that extend from and are a part of the Black Tail incline marked on [343] your map. Why is there no geology on this?

(Testimony of Arthur Lakes, Jr.)

A. These workings marked white are dotted on the base map, are dotted on all other maps, as they were inaccessible and under water. I would explain that part of the workings of the Black Tail workings were gotten from the official maps of the Hope people, who previously owned the Black Tail claim. I got that from the map. I never was in these.

Q. In the Black Tail workings or any of the workings that extend below it. A. No.

Q. These contour lines marked in brown, how far apart are those?

A. The contour lines marked in brown are 25 feet apart from here to here, and 50 feet apart from there on. The scale of the model is the same as the scale of the map, 40 feet to the inch.

Q. I think I overlooked one matter here on the No. 3 level. What do you find there?

A. On the No. 3 level, a little to the southwest of 81–C there is—oh, No. 3 level, on No. 3 level in the vicinity of 74–C, there appears to be a gouge slate cutting off the veins. It was followed to that point and stoped above. At the point marked "yellow" along the crosscut from No. 3 tunnel, over to the Surprise vein, there is a vein of quartz crossing in a northwest direction, dipping to the northeast.

Q. Does that correspond with any other exposure that you have?

A. It apparently corresponds in dip, or with relation to the exposure at 64–C. [344]

Q. Now, as you extend further out southwest in this working on the third level, what do you find?

A. On No. 3 level, southwest from the vicinity of

(Testimony of Arthur Lakes, Jr.)

74–C, there is a tunnel driven south and a little west along a quartz vein. At Station 336 the strike of this quartz vein is southwest.

Q. And indicated there?

A. As indicated in red on the model. At 336 there is a little tunnel driven easterly along a vein which dips northeasterly and strikes a little dip—well, southeast; that is almost due east. Beyond that is another small vein with a strike southeast and a flat dip. Beyond that is only very small and indefinite quartz stringers indicated in the tunnel.

Q. Where, in your opinion, is the No. 2 vein in relation to that tunnel?

A. The No. 2 vein with relation to that tunnel, is up about the second main cross-vein. That is, following along in a southwest direction, to the vein that runs southeast.

Q. Now, going on to No. 4 level, and in the southwesterly portion of what you have here in red, what do you find?

A. In the vicinity of 81–C the quartz apparently is cut by gouge—it is cut by gouge which extends southerly along a little tunnel that was driven. Beyond that to the southwest there appears quartz for about 25 feet on the right wall, and evidently crosses in a southwest direction.

Q. Crosses into the wall?

A. Crosses into the wall, evidently.

Q. Going now to the No. 6 level, what do you find? [345]

A. In the southwestern end of No. 6 near Station

(Testimony of Arthur Lakes, Jr.)

212, the vein appears to be cut by a fault plane, the face showing a small streak of calcite and quartz.

Q. Coming over into the Last Chance workings I notice a blue streak here on the end of the fifth level of the Last Chance mine. What does that indicate?

A. The blue streak at the northeast end of the fifth level at about Station 156–C, indicates a fault cutting across the end of the vein.

Q. Does the vein, in your estimation, pinch out and die out at that point? A. I think it is cut.

Q. Would it be found beyond, in your opinion?

A. Possibly by further exploration, one side or the other.

Cross-examination.

(By Mr. GRAY.)

Q. Now, Mr. Lakes, we have heard a lot about this fault. Upon the level, what is the apparent displacement of this Pine No. 2 vein, as you call it, by this fault, in feet? A. About 20 feet.

Q. What is the apparent displacement upon the level of what you observe and call the Black Tail vein by this fault?

A. I should judge about 35 or 40 feet.

Q. This yellow working which extends down from the bottom of the gulch was the old winze which caved, the surface winze?

A. It was not. This yellow working that extends down [346] from here, was a raise that was driven up on the vein from the level?

Q. Oh, I see. And that follows down as the Black Tail vein? A. Yes, sir.

(Testimony of Arthur Lakes, Jr.)

Q. Does that follow down in the winze from the No. 2 level? A. From the No. 2 level?

Q. Of the winze drift.

A. It apparently was cut off by the slip which this vein follows, at a distance of about 10 feet down.

Q. What do you mean by "which the winze follows"?

A. Which this winze follows. Along the dip of the Black Tail vein—or the dip of that upraise is flatter than the dip of the slip and the slip apparently has this relation to the vein, the vein coming in this direction, the slip coming down, and it got narrower as it went down.

Mr. COLBY.—Pinched off in other words?

A. Yes, sir.

Q. You painted it blue upon the east side of that winze, that slip. Is that the main fault that you have been speaking of? A. I cannot say.

Q. Well, what is your judgment?

A. I don't think it is.

Q. You have been up there 11 months.

A. I don't think it is.

Q. What fault is that? [347] A. I don't know.

Q. Another one? A. I think so.

Q. It is found at the bottom of the upraise near Station 340, isn't it?

A. Yes, crossing along the top of the tunnel near 340.

Q. On the hanging-wall of what you call the Black Tail vein?

A. Yes, cutting across the hanging-wall.

(Testimony of Arthur Lakes, Jr.)

Q. At that point, is it cutting across the hanging-wall, or is it shown as the hanging-wall, along that working?

A. At the top of the working it is shown as the hanging-wall.

Q. Where do you find that slip again?

A. This slip on this level or below?

Q. Any place.

A. We appear to find that slip at Station 349, or in that vicinity.

Q. Along this old working which was first extended out from the winze in a northerly direction?

A. Yes.

Q. Where do you find it again?

A. I cannot say as to the end of the tunnel, because it was not mucked out when I was there.

Q. It apparently shows at the end of the tunnel running from the gulch winze? A. Yes.

Q. That is at the point about 40 feet north of 350, is that correct? A. Yes. [348]

Q. Do you find it any place else on the No. 2 level?

A. No, I cannot say positively. It is gouge in the vicinity or north of Station 341; that may be the continuation of it.

Q. Now, you say that the Black Tail vein is thrown by this main fault that Mr. Burch described so beautifully, about 20 feet on the level. Show me where it is on the No. 2 level north of Station 340, after the fault passes through it.

A. After the fault passes through it?

(Testimony of Arthur Lakes, Jr.)

Q. Yes. A. At 64–C, the Black Tail vein.

Q. Where is it faulted by this fault that Mr. Burch has described?

A. It would be faulted in this vicinity.

Q. In what vicinity?

A. In the vicinity west of 334. That is where it approached the fault plane.

Q. Then you would expect to find the Black Tail vein just west of Station 334?

A. You might find—yes.

Q. You found it, as a matter of fact, in what is called the sand winze?

A. We found some quartz in the sand winze with a strike running parallel with the strike shown here.

Q. Which you recorded as the Black Tail quartz?

A. I don't say that I recorded it, but in coloring the model, we gave it that color.

Q. And in coloring the maps?

A. We gave that indication. [349]

Q. In other words, it is shown—

A. It is shown right here.

Q. Now, that would approach the fault, then, that Mr. Burch has described, and which he says runs up past Station 331, just opposite the sand winze?

A. It should.

Q. In other words, that vein has a dip to the southeast and at about the level of the No. 2 tunnel would be found just to the end of the workings at 331½, is that correct? A. It should.

Q. And there you have, in that working this fault that Mr. Burch has described? A. Yes.

Q. How far is it to where you pick it up on the

(Testimony of Arthur Lakes, Jr.)

other side of that fault? Just take the scale and measure it. A. You are asking the question—

Q. No, you just measure that.

A. It is about 100 feet.

Q. One hundred feet?

A. Along the plane of the fault.

Q. I asked you what the apparent displacement on the level was, and you said it was 20 feet. What is it when you come to measure it according to your own map? One hundred feet, isn't it?

A. Along the plane of the fault it is; yes. The displacement of the two segments of the vein, is the way I understood your question.

Q. I asked you what the apparent displacement was on the level. [350]

A. Well, I understood your question to be in another way from which you asked it.

Q. How did you understand it?

A. I understood you to ask me what the displacement of the vein in its strike would be by the fault.

Q. Well, you misunderstood me. You say it is 20 feet. How do you get that 20 feet?

A. I estimate it from the workings.

Q. Whereabouts? Just show how you can observe it and figure it out.

A. I took the strike of the vein as shown in the southwestern part of No. 2 level, and the continuation as shown by 64–C, the distance between being about—I didn't say 20 feet.

Q. One hundred feet? A. No.

Q. Measure it again.

A. It measures about 50 feet.

(Testimony of Arthur Lakes, Jr.)

Q. Fifty feet? A. Yes.

Q. Then there is a throw horizontally of 50 feet in your judgment instead of 20 feet?

A. I didn't say 20 feet.

Q. You said 35. I beg your pardon.

A. I said 35 or 40, Mr. Gray.

Q. You make it 50 now?

A. I have measured it.

Q. How did you get the vertical throw?

A. I didn't introduce that as testimony. [351]

Q. Well, is it a vertical fault? A. Yes.

Q. What is it? A. I have not measured it.

Q. How could you measure the horizontal throw if you did not measure the vertical—how do you know that it is not all horizontal displacement?

A. Well, at one place, No. 4 level, I found what appeared to be a striation, a curve in the fault, and the sloping in this gouge here appeared to have a relatively vertical direction, if I understand your question properly.

Q. In other words, you found on No. 4 level, that the fault that you picked out as the same here, has vertical striations?

A. A relative vertical striation.

Q. What was the dip of those striations and the direction?

A. Well, the dip of the striations was about 60 degrees.

Q. In what direction?

A. In a north—let's see; may I refer to my notes?

Q. Yes. So that his Honor will understand it,

(Testimony of Arthur Lakes, Jr.)

the striation is in the fault plane to show the movement of the fault?

A. Yes. I did not measure the dip of the striation.

Q. You have it indicated by its dipping in a southeasterly direction, slightly east of south.

A. That one striation; yes.

Q. You have one, haven't you, at 56?

A. No, that is the dip of that plane. [352]

Q. But the direction of the striations are slightly east of south?

A. Slightly east of south at that place.

Q. What is the strike of the fault at that place?

A. North 8 degrees east.

Q. And its dip? A. The dip is 56 degrees.

Q. To the south?

A. Well, it would be easterly.

Q. Now, that is the main fault that Mr. Burch has been talking about and which you have referred to? A. That is the main fault.

Q. And there it has a strike of pretty nearly—

A. Pretty nearly north and south.

Q. Pretty nearly north and south? A. Yes.

Q. What is its strike on the No. 6 level?

A. It is approximately parallel; pretty near north and south.

Q. And dips— A. About 57 at that point.

Q. Which is approximately the same as in the other. A. Yes.

Q. On the No. 3?

(Testimony of Arthur Lakes, Jr.)

A. North 18 degrees east, with a dip of about 40, flattened locally.

Q. Mr. Lakes, was it your opinion that the portion of the vein which is marked red on the No. 4 level on the two sides of that fault were parts of the same vein? [353] A. I don't know.

Q. I asked you as to your opinion.

A. It is a question that cannot be answered.

Q. What vein is it, then, that you show on the westerly side of that fault?

A. It could be the continuation.

Q. I asked you if you had an opinion of what it was. A. I cannot say that I know.

Q. Why did you mark it in red?

A. Because it has all a northeast-southwest direction, which the veins are marked red in this direction.

Q. You do not pretend to say that it is part of this so-called system? A. I have not said so.

Q. I suppose, as a matter of fact, you spend more time than Mr. Burch or any of these other gentlemen on that property? A. Yes.

Q. Come back up here to this level, in No. 3. Do you mean to say to his Honor that this red vein is cut off in that drift, west of 336, by what you recognized as a northwest and southeast vein?

A. I don't say that it is cut off.

Q. Why did you paint it that way?

A. Because I did not see it going beyond. I tried to detect the geology as we found it throughout.

Q. At 336, can you find a vein coming from the

(Testimony of Arthur Lakes, Jr.)

south, and actually crossing through a vein which runs in an easterly and westerly direction? [354]

A. At Station 336?

Q. Yes, sir; right here.

A. You can see a vein coming from a southeasterly direction, coming up to the vein going in a northeasterly direction, with a little crack in it that appears that it might either—

Q. It might either join or cross? A. Yes.

Q. So that the painting on it would be a little misleading in that respect. It shows here that it crosses.

A. No, it would not be entirely misleading. We want to show the dips of the vein.

Q. Let us come down to this working at 331. That is the working which goes southerly from Station 331 which we have referred to as 331½.

A. 331½; yes.

Q. Do you find a gouge running along there as you have depicted it upon this model?

A. Not as plainly, because the east half of the tunnel is in wash.

Q. Do you find that gouge in the face of that little working as it is to-day?

A. You find quartz in the right and wash immediately behind it in the left.

Q. I suppose by exclusion you mean to say you do not find the gouge?

A. Without the gouge appearing in the surface rock—

A. I asked you if you found it.

(Testimony of Arthur Lakes, Jr.)

A. I did not.

Q. And yet you have painted it. Do you find in the westerly face of that working to-day, quartz?

A. Yes. [355]

Q. Is that course followed continuously back to Station 331?

A. This part of the quartz in the center of the tunnel is followed back to Station 331. That on the side is picked up in this crosscut.

Q. Where did you find it in the working? Now, assume that we are looking south on the right-hand side of the drift at the face where is the quartz?

A. The quartz is on the right-hand side of the drift about a level with my hand, about three or four feet.

Q. Isn't it, as a matter of fact up in the roof?

A. There is some there.

Q. As you entered that drift, where was the quartz?

A. The quartz was on the right-hand side near the floor.

Q. Near the floor. Could you get the direction and the course of it? A. Yes.

Q. What was it, what was the strike?

A. The strike of the quartz in the vicinty of 331 was almost due south.

Q. What was it at the face?

A. It was hard to get the strike, but the strike that I took was south 10 degrees west.

Q. As a matter of fact, that working is running diagonally across those bands of quartz, isn't it?

(Testimony of Arthur Lakes, Jr.)

A. That working was—if the working had followed the quartz band exactly, it would have come directly to the right. [356]

Q. At the beginning you have those quartz bands dipping in what direction?

A. They dip easterly.

Q. When you started in that working they were at the floor and at the face, they have gradually raised up until you find them in the roof; isn't that true? A. Well, when I started the working—

Q. Just answer the question.

The COURT.—Answer the question directly.

A. They were not there in the floor.

Q. Didn't you tell me they were near the floor?

A. They were near the floor.

Q. They were near the floor. At the face they are near the roof?

A. About on a level of where I held my hand.

Q. Didn't you tell me there was some of it in the roof? A. Some of it in the roof; yes, sir.

Q. Is there any near the floor at the face?

A. No, it is wash.

Q. On the right-hand side?

A. There is some in the right-hand side near the floor, some quartz.

Q. Some quartz. A minute ago you said—

A. I said I represented it on this model about where I got it.

Q. I asked you if, as a matter of fact, as you look as you walk along that working when you enter it you don't find the quartz in the working near the

(Testimony of Arthur Lakes, Jr.)

floor and that when you get to the face the quartz that you find is at [357] higher elevations as you go forward to the face; that is true, is it?

A. Departing, yes.

Q. Now, then, come over to this map, the detail sketch—

The COURT.—We will take a recess of 5 or 10 minutes.

(Thereupon a recess was taken.)

Mr. GRAY.—I want to ask you a question or two about one or two of those surface workings. Did I understand you to say that in the cut G–1 there was only from 6 to 9 inches of quartz?

A. I saw 6 to 9 inches of quartz.

Q. Isn't it a fact that there is at least 2 feet of solid quartz disclosed and open to observation in that cut at this time? A. I saw 9 inches.

Q. When were you there, Mr. Lakes?

A. Two weeks ago.

The COURT.—That is the cut in close proximity to the gulch, is it not? A. Yes, sir.

Mr. GRAY.—Yes, sir; the lower third of it, I think, is in the wash, isn't it? A. Yes, sir.

Q. Now, you show quartz in what you call the Pine vein on the east side of this fault in the working in the trench north of 558?

A. Yes, sir. [358]

Q. Take and measure off for me 20 feet along that fault.

A. Approximately under C in the word "cut."

Q. Where is the quartz in what would be the

(Testimony of Arthur Lakes, Jr.)

faulted segment of the Pine vein on the west side of that fault—why didn't you show it if it is there?

A. I did not find it.

Q. You found it just a few feet below there on that side of the fault, didn't you? A. Yes.

Q. But you did not find it out here in this surface trench? A. I did not.

Q. Where is the quartz of what you choose to call the Lone Pine vein on the west side of what you choose to call a fault which displaces it in the trench north of 558? A. There is no quartz there.

Q. Where is the other end of that vein?

A. Up here.

Q. I said of what you call the Lone Pine vein.

A. I call this the Lone Pine vein.

Q. What do you call the Black Tail vein? I beg your pardon.

A. Oh, it is not exposed on the surface.

Q. It is not exposed in that trench on the west side of the fault? [359]

A. The quartz on the west side is not exposed in the trench.

Q. Well, why not?

A. Well, it was covered with debris. Work has not been done to uncover it.

Q. Didn't you follow up that fault far enough to find the other end of it, if there was another end on the west side? A. I did not.

Q. How far would the trench have to go?

A. I don't know.

Q. Do you know how far the displacement is on

(Testimony of Arthur Lakes, Jr.)

the level; now how far would it be?

A. I don't know.

Q. You cannot tell? A. No.

Q. Can you tell how far you would have to follow down that trench to find what you call the Lone Pine vein on the west side of that point?

A. Not exactly; no.

Q. Well, don't you know what the displacement is on the level along the *plain* of that fault?

A. Yes, sir.

Q. What is it? A. About 100 feet.

Q. About 100 feet? A. Yes, sir.

Q. Measure down 100 feet, then, and let us see about where that will bring you. [360]

A. About the center of the gulch.

Q. About the center of the gulch. And in the direction of the fault. A. Yes, sir.

Q. Let us see if we can locate the center of the gulch—can you locate the center of the gulch with reference to corner No. 1 of the Pine claim?

A. How near do you wish it?

Q. Approximately. A. About here.

Q. Just put a mark there some place where you put the pencil mark, put an L on Exhibit 28. Now, Mr. Lakes, on that same level you have quartz on the west side of that fault. How do you account for it in the working along at 331 and 331½; if it had been displaced 100 feet at that point how do you account for the fact that you show it there on the west side of the fault?

A. It is there, the quartz is there.

(Testimony of Arthur Lakes, Jr.)

Q. Then it was displaced 100 feet there, was it, by that fault?

A. I did not get that question, Mr. Gray.

Q. Was the Pine vein, so-called, displaced 100 feet by this fault we have been referring to in the vicinity of Stations 336 to 331 and down the working 331½? A. I haven't measured it. [361]

Q. Could there be a displacement of 100 feet at the surface and not a similar displacement on this level, speaking now of the No. 2 level?

A. I don't think so.

Q. Now, there isn't any actual displacement on No. 2 level, is there, on the two sides of this fault, of what you call the Pine vein?

A. By displacement, you mean throw of the fault along the Pine vein fault?

Q. No, along a horizontal plane. Now, you said on a horizontal plane that it was 100 feet displacement, apparent displacement on the level?

A. What vein?

Q. The Pine vein. A. I said 25 feet, about.

Q. 25 feet, about, on a horizontal plane?

A. Yes.

Q. Now, that is not along the plane of the fault, but the apparent displacement of the vein?

A. Yes.

Q. Do you find a 25-foot displacement on the two sides of that fault, of what you term the Lone Pine vein?

A. I match up the two ends of the Lone Pine vein. That gives me a throw of about—

(Testimony of Arthur Lakes, Jr.)

Q. Whereabouts on the two sides of the fault?

A. What?

Q. On the sides of the fault?

A. This is the upper side of the fault and that is the lower. [362]

Q. Why, Mr. Lakes, look at your map.

A. Yes.

Q. The ore which you show in red at Station 326— A. Above the fault?

Q. Above the fault. —and that which you show just west of Station 330 and in 331 is below the fault. A. Following the fault?

Q. Yes, sir. A. Yes, sir.

Q. Where is the throw of 25 feet there? You have continuous quartz, haven't you?

A. Have continuous quartz.

Q. Now, then, on the surface, coming back again to this trench, why don't you show the same quartz 25 feet down or approximately continuously on the west side of that fault?

A. The quartz that follows the fault I did not see on the surface.

Q. As a matter of fact, I did not see from your map, there is not an interruption of the quartz on No. 2 level, is there?

A. Quartz breccia, quartz partially dragged in the fault.

Q. Do you want his Honor to understand that the quartz that is shown from 331 to 331½ and along there, is drag quartz? A. Partially.